# THE MODERN THEORIES OF JURISPRUDENCE

Tagore Law Lectures, 1921

# THE MODERN THEORIES OF JURISPRUDENCE

By

KARUNAMAY BASU, M.A., B.L.

CHAIRMAN OF THE BOARD OF LECTURERS (IN JURISPRUDENCE AND ROMAN LAW), UNIVERSITY LAW COLLEGE, CALCUTTA

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*The Plea for a Synthetic Philosophy of Law*



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# PREFACE TO VOL. II

The first volume having already outgrown the ordinary size of an annual course of Tagore lectures, it became incumbent upon me to revise and cut down the manuscript of this volume to much humbler proportions. So some lectures, *viz.*, Lectures X, XI, XII and portions of Lecture XIII, have now been taken out; and the remaining Lectures have been re-shuffled with modifications and changed numbers. The Lectures, now omitted, were written (as will appear from the Foreword printed in Vol. I) in pursuance of a self-imposed constructive programme superadded to my proper subject which, strictly construed, professes to be only an expository study of the modern theories. This curtailment therefore, in effect, restores the original programme as sketched out in my Synopsis and Introductory Lecture that had been approved by the University. Besides, I am now more than ever convinced that the proposed reconstruction of the Synthetic Philosophy of Law in the light and spirit of our ancient Oriental Philosophy should be, if at all (in justice to the subject as well as to one who undertakes it), taken up separately as an independent piece of work and must not be tacked on, with a necessarily meagre and perfunctory treatment, to an already self-contained series of Tagore Lectures. As early as 1921, when I wrote the Foreword, I had my misgivings about the wisdom of the latter course and expressed the hope that the University should, in view of the magnitude and loftiness of the subject and its extreme serviceability to the cause of comparative legal philosophy, adopt more adequate

measures to encourage its culture.* The great patron of learning, whose words uttered while he was at the helm of our University, had (as indicated in the Foreword) first suggested the idea which inspired my effort, is unfortunately no longer in the land of the living; but, as one interested in the subject, I cannot help hoping that those who are now in charge of our Alma Mater will yet see their way to afford adequate facilities and encouragement for the carrying out of the scheme in the way that it deserves. The lectures printed in this volume will, it is expected, serve as a connecting link between those printed in Vol. I which describe the modern theories and the Synthetic Legal Philosophy of the 20th century that is to come. They prepare the way by exhibiting the modern feeling, which is almost unanimous, that a final and all-round synthesis of legal theories is the great desideratum of the present age; and may, therefore, be appropriately given the name that I propose for them, *viz.*, "The Plea for a Synthetic Philosophy of Law."

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* *Vide* Vol. I, Foreword, pp. vii-viii.

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# PART IV

# The Present Era of Synthesis or Unification (of Jural Theories and Methods) in its Constructive and Critical Aspects

# LECTURE VIII

## The Sociological Tendency in its Present Juridical Ferment.

### *Intermingling of Methods and Variegation of Theories and Interpretations.*

Our study of the latest juridical theories has[1] disclosed how the sociological spirit was realising itself through the transformations it wrought in the empirical as well as philosophical lines of juristic thought, and had, at the close of the last century, drawn them closer towards each other with most of their points of antagonism (so prominent in the days of individualism) rounded off and subsumed under some common general postulates. Prof. Roscoe Pound has thus summarised these common elements[2] which he describes as the characteristics of the sociological jurists:—"1. They look more to the working of the law than to its abstract content. 2. They regard law as a social institution which may be improved by intelligent human effort and hold it their duty to discover the best means of furthering and directing such effort. 3. They lay stress upon the social purposes

Common characteristics of later sociological jurists.

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[1] *Vide* Lectures V, VI and VII, Vol. I, Tagore Lectures, 1921.
[2] 25 Harvard Law Review, p. 516.

which law subserves rather than upon sanction. 4. They urge that legal precepts are to be regarded more as guides to results which are socially just and less as inflexible moulds.'' You may recollect how these features grew more prominent in the empirical sociologists and sociological jurists as they advanced from the materialistic positivism of Comte and Spencer to the psychological evolutionism promulgated by Jhering and established as a science by Tarde and Ward ; and how again they were cherished and elaborated by the modern idealists who, like Stammler and Kohler, came more and more heartily to embrace realism as the necessary fulfilment of philosophy. The Philosophy of Law was thus fairly identified with the Science of Law and appeared, in combination, as the social Psychology of Law of Wundt, Zitelman, Gierke and Jellineck. The psychology of the race, and of general humanity as a whole,—the world of psycho-social forces with their roots imbedded in the evolving life of communing humanity—now became the chief centre of analytical as well as historic study and investigations, of observation and experiment ; because these were found to dominate over the geo-physical, physiological, economic and other naturalistic (materialistic) evolutionary forces in the making of social institutions and laws. Philosophy induced science to direct its investigations inward towards the region where unity prevailed and the isolation, effected by our physical individuality and environment, was dissolved by the more freely moving communion of psychic sympathy and thought ; and science taught philosophy to recognise the advantages of its surer

method,—that of observation and experiment—its practical utility and certainty of result, and abstain from purely *a priori* speculations as to the absolute reality, absolute good and absolute law, which are wholly transcendental and unconnected with the concrete manifestations of social life. You find here, as I told you in the introductory lecture, the philosophy and the science of Law advancing towards each other, combining the inwardness of the former and the method (considerably improved and extended) of the latter for the attainment of the most fruitful results. They alike received support from the psychology of Law and practically there ceased to be two as sharply exclusive and bellicose schools of Jurisprudence as heretofore.

Modern psychology establishes a connexion between idealism (Philosophy) and materialism (Science).

A similar development of ideas and outlook is observable with regard to the Analytical and Historical schools. True analysis of an institution, it was understood (as soon as the principle of evolution was thoroughly established and accepted throughout the scientific world), cannot overlook its origin and growth; and conversely history was recognised to be only a means and not an end—a means, firstly, of complete analysis and appreciation of present developed facts and features of social life, and next, of supplying knowledge of its inner life and constitution so that the blind evolutionary forces playing upon it may be intelligently guided towards conscious ends. We have thus reached what Prof. Roscoe Pound calls the stage of Unification,[1] and there is no doubt that the greatest advance towards

Rapprochement of Analytical and Historical schools.

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[1] 25 Harvard Law Review, p. 509.

this unification has been made by the Psychological school and theory of Jurisprudence.[1]

Rapprochement of individualism and socialism.

The importance of the individual—his will and interests—in law and legislation came gradually to be recognised in the later phases of sociological jurisprudence and the so-called paramount claims of the state, or of the dominant classes, to which the individual had been mercilessly sacrificed in its earlier stages condescended, as we saw in the last lecture, to seek out some sort of compromise with those of the individual in the logic, ethics and psychology of Law. Thus we find, that on the eve of the 20th century, there appeared on the horizon the budding synthetic sociological Jurisprudence[2] to which all the previous juristic

The budding synthetic (sociological) Jurisprudence of the 20th century.

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[1] See Lec. VII for an account of this school.

[2] Prof. Roscoe Pound has placed Sociological Jurisprudence (proper) apart from the Social-Philosophical Theories of Law; and thus (although he more than once points out the similarities, on many points, of the Sociological Jurists on the one hand, and the Social-Utilitarians, the Neo-Kantians and the Neo-Hegelians on the other, *vide* 25 Harvard Law Review, p. 576, nevertheless) he refuses to class the exponents of these latter theories as Sociological Jurists. Prof. Pound's position is explained by the fact that he is inclined to take Sociological Jurisprudence, or rather what he calls by that name, as limited to those views and theories of Law which can be affiliated to Positivism by the line of direct lineal descent (*vide* 25 Har. L. Review, p. 489), *i.e.*, as I take it, to those which had originated from and were developed mainly, if not exclusively, by the scientific (as opposed to the philosophical) method first promulgated by *Comte*. To my mind, this limitation would introduce confusion; and, by converting 'sociological jurisprudence' into a term of art, unnecessarily restrict its ordinary and grammatical signification and unduly throw out of its pale jurists of the highest calibre and genius to whom both Sociology and Jurisprudence owe their richest recent contributions. I should like it to include scientific and philosophical Jurisprudence alike as soon as the science of the former or the philosophy of the latter comes to view things from the point of view of the society, and not of the individual,

Sociological Jurisprudence: its wider and stricter meanings.

schools had contributed their best possessions. It was just preparing to formulate a coherent principle of socio-juridical science and philosophy such as would appropriately serve as a sound as the unit or starting point; and I should therefore equally regard Spencer and Stammler, Gumplowicz and Kohler as sociological jurists. Lectures VI and VII should, in this view, be taken, both of them, to deal with the developments of Sociological Jurisprudence, the former from the scientific or empirical side (sociological Jurisprudence proper, according to Prof. Pound) and the latter from the philosophical side. The Psychological School and Theory (classed even by Prof. Pound with Sociological Jurisprudence) would thus constitute the meeting point of the two complementary and co-ordinated currents of juristic thought which appeared, by way of reaction against the extreme claims of Law of Nature and Individualism, from the rootsprings supplied by widely divergent geniuses like Hegel, Rousseau and Comte, all of whom conceived and preached, in diverse ways, the same truth or part of it, *viz.*, that the individual was the expression or product of the social or universal forces or realities behind him and must be understood and estimated with reference to and through them.

**Its fountain-heads.**

This sociological conception, thus formulated diversely by the fountain-heads—philosophers, sociologists and jurists—is traceable, as we have seen (*vide* Lec. V) to the still earlier source of economic necessity. It was forced on the world by the necessity of adjusting the grievances of the individual arising out of his own extreme self-assertion. The death-blow to Individualism came when the individual felt the disadvantage of inequalities brought on this world by historic evolution, and to his chagrin, understood that these inequalities were partly of his own making;—that the principle of individualism had been partly responsible for the creation of these disadvantages and difficulties from which it was now wholly unable to protect or relieve him.

**It arose out of economic difficulties which were the outcome of extreme individualism.**

The process of nature is, however, usually slow. It takes long before a new idea casts off the inertia of a long continued period of presuppositions born of fundamental errors; and so even the new-born sociological conception had a long course of painful and unfruitful life during which it retained the fatalistic view of things bequeathed to the world by the Historical school of jurists. The empirical sociologists and sociological jurists, proceeding by the methods of science,—mechanics, biology (natural evolution), ethnology, anthropology, etc., preached and preached their new-fangled causal theories of society and law without any perceptible benefit and tangible progress toward social or economic amelioration. The current of thought which I call philo-

**Its evolution.**

**1st stage—positivistic and causal.**

foundation for a thorough-going scheme of social and legal reconstruction. This was sorely needed in the era of all-round change and progress that had

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sophic-sociological jurisprudence (and which Prof. Pound chooses to call social-philosophical jurisprudence) now came in by way of criticism to rectify the mistakes of the sociological school proper and to point out the true ideal of Law and Legislation, the efficacy of conscious effort and the superiority of conscious will over the fatalistic natural forces. The modernised philosophy of Law forcibly pointed out the defects of positivistic sociological theories—those born of an extreme partiality of thought towards the real, the actual or the present, to the absolute exclusion of the ideal end or future—just as the latter had demonstrated the defects of the older legal philosophy by pointing out the futility of one-sided devotion to the absolute ideal without consideration of the concrete realities of the past and the present. The earlier positivistic sociological theories had identified the Law of Jurisprudence with physical law, conceived it to be only a representation of actualities and denied the existence of any moral law of "what should be" in nature. There was, according to them, no law but only facts. Law, among human beings, was only one kind of artifice employed by the society for its own ends,—the rule of action imposed in self-interest by the dominant individual or class that focussed the social forces upon the rest who had to submit to it. These were doctrines of force and expediency divorced from morals and hence, philosophic criticism directed against sociological jurisprudence (*i.e.*, of the empirical or scientific type discussed in Lecture VI) shadowed and hounded it through all its stages of malleability (which, as we have seen in Lectures VI and VII, was secured by the scientific recognition of the value of the comparative method through the influence, first, of the Historical school, and next, of the Darwinian doctrine of evolution, now accepted as operative in the social as well as in the natural sciences). Science, with all its causal explanations of (what *is*) Law, derived from the past and the present, felt itself beaten by the cry or demand for the enunciation of a valid principle of (what *should be*) Law; and at last, it had to leave fatalism behind and rise higher into the region of the psychic forces which rule over and direct the natural forces to form society and law at the bidding of the conscious will and accommodate causality and teleology to each other. The new Psychology attempted to reconcile science and philosophy; empirical jurisprudence emerged purified by philosophic criticism and it tried as well as it could to amalgamate the best points of all the previous schools, Analytical, Historical and Philosophical, with the added leaven of Sociological Psychology.

2nd stage—philosophic criticism of the causal theories.

3rd stage—development into psychological jurisprudence.

commenced after the French Revolution and was daily growing more and more critical. It was not a completed synthetic system of thought but a tendency towards its achievement in socio-legal science and philosophy. Many bye-products of this tendency are appearing which increasingly testify to the continuing process of rapprochement, synthesis, and compromise of the previous schools and theories. They constitute partial amalgamations of principles, ideas and methods and would serve as useful intermediary steps towards the final form of the one future Synthetic Science and Philosophy of Law, of the 20th century. The principles, postulates and assumptions underlying many or most of these bye-products all fall under a few—two or three—fundamental categories and their soundness and validity came to be carefully examined by experts; and this period of testing has not yet yielded its final conclusions. Sociological Jurisprudence, as it is approaching its fullest maturity, is passing through an era of severe strain and stress—a period of juridic ferment—when the new juridic conceptions needed and discovered are passing through scientific and logical tests and Jurisprudence is awaiting their fate with anxious doubts and uncertainties.

Bye-products of the synthetic tendency.

Testing of its cardinal principles by experts.

I shall now proceed to familiarise you with some of the principal bye-products—partial combinations of jural ideas and methods—and illustrate the expert testing of their principles and categories that we now find in this incubating perrod of legal and juristic history.

As soon as the fatalistic views of the

**Recrudescence of the Imperative theory of Law.**

Historical and the early Sociological Schools dissolved under the acid test of modern philosophical criticism launched by the social-philosophical jurists (including the most practical and least philosophical amongst them, *i.e.*, the social-utilitarians like Jhering) and the causal sovereignty of the conscious will over the evolving natural forces and their material products was at least partially established by the Psychology of the last decade of the 19th century, the Imperative theory of Law cherished by the Analytical school regained a part of its lost prestige and came by its own though in a sociological form. The new sociological tests found the older analytical theory wrong and defective not so much on the particular points noticed in Lecture IV but in the direction of practical utility as well as in its conception of the nature of society and of the needs of social progress.[1] Binding's[2] Theory of Norms (accepted also by Thorn, b. 1839) which appeared in the last

**Binding's Theory of Norms.**

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[1] The sociological objections to the Analytical theory have been summarised by Prof. Roscoe Pound in 24 Har. L. Review. They refer principally to its faulty and restricted method of obtaining legal principles only from the past (and even that limited within the two storehouses of Roman Law and the English case-law) and applying them deductively to the concrete problems of the present day with a scientifically unsound assumption that the present is wholly included in the past and demands no fresh fund of legal principles for the novel requirements of the times. They also take exception to the extreme rigidity and importance ascribed and attached by the Analytical theory to the letter of the Law, *i.e.*, to the form or expression given to the inner rule or norm of action by the words of the statute. The deeper sociological objections regarding its conception of the state and sovereignty will be noticed in connexion with the bye-products which are discussed below.

[2] Born 1841. See Berolzheimer—Legal Philosophies, p. 381.

quarter of the 19th century is a remodelled form of the Austinian theory. It lays stress on the underlying 'norm' or regulative principle more than on the more superficial and rigid crust or form of words by which it is expressed in Law. The imperative norm is the essence of the Law and not the imperative 'command' of the sovereign. The command becomes imperative by virtue of its expressing an unwritten norm which is already imperative as a principle of action imposed by the communal will for the regulation of individual conduct. You would at once perceive how the imperative element of the Austinian theory is retained as the essence of the law; but the modifications are important. Each of the constituents of this imperative, *viz.*, the will, the sanction and the force is transferred from the sovereign to the community and the reality of the law is attached to the psychic principle of the rule instead of to the expressed words or writing in which it comes to be formulated as 'command.'

Its comparison with the Austinian theory.

Bierling (b. 1841) rendered the same service to the theory of Norms that Jellineck did to the psychosociological theory [1] by pointing out that the imperative communal norm which constitutes the essence of Law acquires its imperative character through the acceptance or acknowledgment of the members of the society. Legislation and statutes are, or become, imperative as Laws only when, or rather because, the members have accepted as imperative a general norm that they should be so,

Bierling's development of the theory of Norms.

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[1] See Lecture VII, p. 529.

thereby investing the government and the legislature with the authority to dictate and give expression to other particular or special imperative norms.[1] This echoes the Historical theory and sounds similar to the "psychological guarantee" pointed out by Jellineck as the real essence of the Law. Law is indeed imperative; but it is imperative not because it is the sovereign's command, but because of the communal acceptance of the norm underlying it.

In spite, however, of this 'inwardness' of the Theory of Norms in comparison to the orthodox imperative theory of the Austinians, and its greater amplitude that covers the unwritten law of the era of customs, it has not succeeded in avoiding the same hostile criticism that charges the Austinian theory as guilty of extreme or undue formality. Even

Merkel's criticism.

the theory of Norms, Merkel points out, is a formal theory; for, as explained long ago by Jhering, "norms and coercion are purely formal factors that afford no knowledge as to the content of the law."[1] It well explains that feature of the law which directly makes it obligatory but not the other, *viz.*, the tests which should determine the principles or norms that are to be made imperative as laws. Imperative norms are laws not simply because they are made imperative by the expression, command or supremacy of the state, but because they are meant for the proper social adjustment of individual rights and interests. It is the interest of others in society with its inherent demand for protection that really urges the state to make laws obligatory

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[1] Berolzheimer—Legal Philosophies, p. 383, 385.

on individuals and induces the members to accept the laws as imperative.[1]

We find in this theory of Norms the same sharp distinction drawn between law and morals as you find in Austin and his followers, as also in the ex-

Law and morals.

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[1] I have nowhere seen a sounder and more comprehensive presentation of the theory of Norms than in the earlier chapters of Prof. Korkunov's Theory of Law. Norms, he explains, are either technical or ethical. The former are rules intended as guides to specific ends. They are rules of art, each set devoted to the realisation of its determinate end like hygiene, grammar or architecture. The latter, on the other hand, determine the correlation of the several ends of human activity, helping us to estimate their relative worth and harmonise them so that they may be simultaneously pursued without conflict and to make a choice when all are not capable of realisation together. The former are objective principles and are as inexorable as the natural laws and forces which they teach us to utilise with effect for the distinct ends desired by man. The latter, on the other hand, are subjective, and therefore variable and relative to the ethical propensities of each individual. Had each man lived an isolated life there would be a separate and different ethical code for each; but man actually lives in relation with others in society and so there arises the necessity, for the sake of social unity and peace, of having a common external standard for the appraisement of the conflicting interests and ends of different individuals. Ethical norms thus come to be subdivided into two classes, one purely subjective or moral, appropriate to each individual and hence variable and relative; while the other is objective and unitary, for it is meant for the regulation of the external conduct of individuals in relation to each other in society. This last assumes the character of legal norms whenever the particular relations are felt to be of such importance and gravity that their regulation by a uniform and certain external standard has to be guaranteed by use of compulsion and force emanating from the organised society as a whole. Thus we have two sets of ethical norms; one legal (characterised by its imperative element), which delimits the sphere of free activity of each individual in society for the realisation of his diverse interests and ends simultaneously and without conflict with his fellows; and the other, moral, by which, each, having his own set, appraises his own ends and regulates subjectively for himself (or at most, swayed by the moral pressure of popular opinion) his volitions and acts for the simultaneous or orderly attainment of all or as many of these ends and interests as possible.

positions of the Formal school.[1] It has also the same formal character, *i.e.*, defines Law only by its external characteristics, *e.g.*, its definite origin in the

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[1] See Lectures II and IV. As regards the subsidiary distinctions deducible from the capital distinction, indicated in the preceding footnote, between Law and Morals, Korkunov remarks :—" Since Law is the delimitation of the interests of different persons juridical norms govern only our relations with others and not those with ourselves. Moral rules on the contrary determine our duties towards ourselves, for our acts have a moral quality even when they concern only ourselves.

" The application of juridical norms is conditioned by the opposition between others' interests and our own; and, by consequence, their observance is obligatory only when such interests of another exists. It is that interest which compels observance of juridical norms. If the person whose interests limit mine, releases me from their observance they are no longer obligatory : *Volenti non fit injuria*. On the contrary, the obligation of moral rules does not depend on the interest which other persons have in their fulfilment. Even if no one impose it upon me moral duty keeps for use all its force; for the evaluation of interests, in a moral point of view, does not change even when they are no longer in conflict.

" It results likewise from this that moral norms impose an inflexible moral duty upon us. From juridical norms there results for us a right and a correlative duty. The right is precisely the faculty of realising a given interest within the limits fixed by juridical norms. The juridical obligation is the obligation to satisfy the requirements which flow from the right with which another is vested with regard to us, the obligation of observing the limits assigned to the different interests under consideration, as determined by the juridical norms. It is thus that, differing from moral duty, juridical obligation continues only while the interests exist for which it was established. Such, for example, is the idea of prescription which extinguishes obligations. Morality does not recognise this idea which has produced such juridical effects.

" The moral *evaluation* of our interests arises from our conscience. Their *delimitation* depends upon exterior relations which are found established between the different persons under consideration subject to Law. Morality, arising only from the conscience, admits of no constraint. Convictions are not created by the action of external force. Law, on the other hand, admits sometimes of constraint precisely in the case of an encroachment upon the domain within whose limits it

will of the state or the society, its force and compulsion—as the imperative theory of the Analytical School, though Korkunov's incisive analysis of the general nature of the *contents* of legal norms goes some way towards removing this defect. The function of Law, he says, is delimitation of the interests of the individual. But even '. delimitation of interests,' as Korkunov puts it, though it somewhat meets Merkel's objections, hardly suggests any principle on which this delimitation is to be made. It limits the function of Law principally, if not solely, to the upkeep of peace and security by preventing confusion and trespass of mutual spheres of interest. No definite and common moral principle of appraisement that must underlie and regulate Law's scheme of delimitation is elaborated, so that it may not be unjust or arbitrary; and thus it falls short of the higher conceptions of the social-philosophical and even of the more advanced psychological jurists. The definition of Law as " a coercive or imperative norm " does not contain "a judgment upon Law as it ought to be " but only determines, like the Austinian theory, the distinctive character of actually

Further criticism of the theory of Norms.

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recognises our right to act freely. Constraint cannot dictate to us our convictions but can arrest and prevent an illegal act. The moral evaluation of interests can find its application when it is adopted by a single man who constrains himself by it in his own acts. On the other hand, that there may be a place for the juridical delimitation of our interests, all the persons whose interests are under consideration must realise the obligatory force of the norm employed. Morality is then rather a rule for the individual, law a social rule. All these secondary differences between law and morals are consequences of the fundamental distinction which we have indicated, that the one is the delimitation and the other, the evaluation of interest."—Theory of Law, pp. 52-54. See also Holland's Jurisprudence, Chs. II and III,

existing laws. In these days of triumphant sociological spirit, when, in view of the exigencies of the pressing social-economic problems, the deductive method of applying legal formulas uniformly for all is, as we shall have occasion more particularly to notice in a future lecture, coming to be more and more discounted and with a growing demand for fundamental principles of legal adjustment pointedly, if not solely, directed to the comparative *evaluation* of the circumstances of each litigant both before and after a judicial decision in the light of social interest and social justice, the theory of Norms, by itself, will hardly suffice as an amended presentation of the Analytical theory satisfying the needs of modern jurisprudence. Sociological Jurisprudence is now demanding for a theory of values instead of a theory of forms. The theory of Norms has a marked resemblance to the Positivistic and Psycho-Sociological theories so far as the formal aspect of law is concerned and it is interesting to observe how the new Psychological theory helped to bring about the resurrection of the imperative idea and its general acceptance in Germany which was once the stronghold of the Historical School.

Two varieties of the theory.

The theory of Norms may be subdivided into two varieties. One would define legal norms as those emanating from, or established by, the sovereign or the state organs. Distinctly Austinian in its character, it practically reduces all law to positive law, identifies law and legislation, accounts for the indispensability of the state for the creation of law and stands for its necessary relativity of character. It excludes customary and international

Law.[1] The sociological variety of this theory, on the other hand, defines legal norms as social norms emanating from the society as opposed to the state.[2]

The Neo-Austinian Theory of Law.

We are now ready to examine another variety of modern legal theories that may be affiliated to the theory of Austin, *viz.*, that of the Neo-Austinians. The Neo-Austinian Theory of Law [3] is the psycho-sociological representation of the cruder Austinian theory, intended so to remodel the latter as to purge it of those two elements, which, in the light of the modern social sciences and psychology, have established themselves as the gravest of its many objectionable features.[4] The Austinians had laid stress on the artificially organised state—or rather, the sovereign ruling the state—as the source of Law. The Historical jurists rejected this view and regarded the state as a natural and historic product (which the metaphysical and organic schools, with deeper insight, detected to be either a dialectic or organic unity) born and grown up by an involuntary process in which the individual wills had no part to take. The organic conception in course of time was accepted and affirmed by science, strengthened and supported by the Darwinian principle of biological evolution, and familiarised to the world by the early sociological jurists. I had occasion to notice

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[1] To cite examples of other camps whc more or less subscribe tc this variety, see Lasson (philosophical) and Jellineck (psychological).

[2] *i.e.*, the sociological groups, *e.g.*, Schaffle, Bierling. The Neo-Austinians would also come under this group.

[3] *Vide* Jethro Brown—The Austinian Theory of Law; Underlying Principles of Legislation.

[4] See objections 5 and 6 referred to in Lecture IV.

before [1] some of their current arguments in support of the organic conception of society and the interconnection of Law and State both regarded as *natural products*. Next came the psychological conception and theory which again re-established the supremacy of the will in the formation of states and laws; but this was not the will of the individual (which was at the foundation of the mechanical or political conception of the state that lay behind the Austinian theory) but the social or racial will. The state, according to the Neo-Austinian theory, is a super-organism or 'a person' with a will developed and intensified into conscious activity (after a long antecedent process of subconscious organic evolution amidst a variety of changing social economic and racial environments) and calculated to mark its impress more and more efficiently directing the future evolution of the social fabric. The Neo-Austinian is thus a disciple of Beseler [2] and Gierke, of Ward and Jhering, and attempts to accommodate Austin as much as possible to their higher sociological and psychic interpretations of society, state and Law. Austin attempted the definition of "a law," *i.e.*, a particular rule of external conduct imposed and enforced as law; but we have instead, as the Neo-Austinian points out, really to define "the Law" as a totality—

**The sources of 'a law' and 'the Law'—distinguished.**

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[1] *Vide* Lecture V, pp. 329 *et seq.*

[2] The founder of the corporation theory of the state. The personality of the state is according to this theory a reality and not a fiction. *Vide* Lecture VII, pp. 536 *et seq.* Berolzheimer—Leg. Ph., p. 370.

as an organic whole. It is the expression of the social will making for the highest social good. It is the command not of the sovereign or his agent—the individual law-giver posited as an outsider supreme over the subjects—but of the state as a totality for the guidance of its own organic parts, *i.e.*, the individuals. The law, thus recognised as the self-imposed regulation by the personified society as a whole of its component elements, in the normal condition of things, requires no physical sanction or coercion for its enforcement. It is valued and respected as the above-explained dignified and august character of its real source of authority and its beneficent nature comes to be appreciated. The will,—*i.e.*, of the totality—issuing the command (the social will) and the will sought to be influenced by it (*i.e.*, the individual will which also participates in the social will in proper *esprit de corps*) ordinarily and naturally move in unison. The sanction is only a secondary adjunct attached to Law to provide for special cases where the individual fails to subordinate his will to the social will and rebels against it. As the social will develops in strength and wisdom it expresses itself through the different state organs by the making of new laws and by repeals and amendments of the old laws. Particular laws are, or may be, enunciated by particular state organs—individuals or bodies of individuals—but the ultimate source of each rule of law and the origin of Law as a totality is the state itself.

Austin's mistake lies in (1) taking laws as isolated rules instead of reading them as members of an organised system ; (2) ascribing them to a visible

Austin criticised by Jethro Brown; Austin's mistakes pointed out.

sovereign instead of the state; and, necessarily, (3) associating with "Law" the ideas of rule by an outsider: of autocracy, compulsion, force, and penalty as its most essential elements. This mistake led the Austinian theory to overlook the organic character and unity of all laws, their spontaneous growth (*i.e.*, the fact that for the right understanding of Law one must study it in its totality and also its growth through the past) and all other ideas and elements that mark out the real and beneficent aspect and purpose of Law. Austin's theory of Law and legal development is mechanical; "it supposes that Law is the creation of an individual ruler dispassionately calculating in a more or less detached or machiavellian manner the best means for promoting the particular ends he may have in view."[1] It fails to see that the most despotic of legislators cannot think or act without availing himself of the spirit of his race and time and it is moreover "ill-adapted to explain the evolution of legal rules during an epoch of customary law."[2]

The Neo-Austinians' definition of Law.

The definition of Law, evolved by the Neo-Austinian theory, would accordingly be that "it is an expression of the general will affirming an order which will be enforced by the organised might of the state and directed to the realisation of some real or imaginary good."[3]

I have already told you[4] how the psychologi-

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[1] Jethro Brown—The Austinian Theory of Law, p. 350.
[2] Do. —Principles of Legislation, Ch. IV, p. 138 (Ed. 1912).
[3] Do. —The Austinian Theory of Law, Excursus, p. 354
[4] *Vide* Lecture VII.

The critics of the Personal theory.

cal conception of the state as a real person is supported by its exponents.[1] They all, including the Neo-Austinians, constitute a class by themselves inside the psychological group. It is one of the fundamental legal and political categories over which modern juristic thought has been, as I said at the top, in a state of ferment. The modern Austinians, both in England and America do not accept it.[2] Pollock, Maitland (who has translated a portion of Gierke's great work) and Vinogradoff [3] have sympathy for it but are not professed converts. The older German jurists like Savigny, Windscheid and others do not subscribe to this personal or realistic theory of the state. The opponents of this theory are of opinion that the "will of all," "unity of will" or personality of the society or state is a clear metaphor or fiction introduced in law and politics for the sake of convenience of thought and expression in dealing with a large number of men taken together by giving them an artificial corporate character. They point out that the history of Law is full of clearest evidence that legal fictions had often been introduced to secure brevity and convenience in thought, speech, and action as well as for legal improvements. Artificial personality has been attached to supernatural beings whose actual existence is not demonstrated; to lower animals, to inanimate objects such as ships (*cf.* the doctrine of 'noxal surrender' and 'deodand');

The Historical school.

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[1] *Viz.*, Beseler, Gierke, Dernburg, Mestre in Germany; Bluntschelli in Italy—*vide* his Theorie Generale de l'Etat, Chs. VIII and X; Korkunov in Russia; and the Neo-Austinians in England and America.

[2] See Salmond—Jurisprudence, 4th edition, p. 284.

[3] See Vinogradoff—Historical Jurisprudence (Introduction), p. 151.

Prof. Gray's objections.

to assemblages of persons (corporations); and to bundles of property, advantages, and rights (*cf.*, *hereditas jacens*, *stiflungen*). Whenever the necessity was felt man had risen to the occasion and his capacity for creating fictions or artificial persons out of any sort of material presented to him has never failed him. Wills belonging really to individual human beings, *e.g.*, those of the owners or masters, or persons placed temporarily in charge of things have been attached to such fictitious personalities and thus the exigencies of the society have been met and satisfied.[1]

Objections like the above, raised by Prof. Gray, are somewhat superficial; they do not care to examine and estimate the essentials of personality nor to distinguish a fiction and a symbol and ascertain their relation to the reality behind them. They are too orthodox to open out their minds to the more forward efforts of the continental savants to grapple with the exact nature of the psychic force, or forces concatenated into a system, functioning inside a state, for the same purposes and with similar effect with regard to the whole society, as the psychic element functions in man.

Duguit's criticism of the Personal theory.

A more searching examination of the reality of collective will however came from the great French jurist Duguit.[2] He maintains that in the world of reality there is no collective will or consciousness of a group apart from the individual wills and con-

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[1] Gray—Nature and Source of Law.

[2] Professor of Constitutional Law at the University of Bordeaux, France. *Vide* his work L'Etat de droit.

sciousness of the members. The *esprit de corps* in any individual which induces him to acts of self-sacrifice for a public cause is not indicative of any metaphysical secondary will running through him and the other individuals and overriding their individual self-seeking wills, but it is a phase of the will and consciousness of the individual himself which are still his own individual will and consciousness although he is at a collective purpose and thinks of himself as solidary with other men. The state minus its organs is a legal nullity, has indeed no personality or even existence, real or legal. "Human groups based on community of wants, on diversity of individual capacity, on reciprocal service; within these groups certain individuals stronger than the rest either because they are better armed, or because a supernatural power is attributed to them, or because of their wealth, or their number and ability, thanks to this greater force, able to compel the obedience of the rest—these are the facts, and the state may legitimately and without fiction stand for such a body of men dwelling on a determined territory and the political sovereignty for power of the stronger therein over the weaker. The assertion of the 'collective will' to explain the state and to found on it political sovereignty which is in fact based on power is only an ingenious fiction. It is the policy of power which is not only based on fiction, but also dangerous as it keeps up and intensifies the ancient conflict between the individual and the state till it results in either the triumph of collective tyranny or of individualistic anarchy." [1]

[1] Duguit—L'Etat, Ch. VIII, pp. 1-52.

Duguit's theory of social solidarity as basis of legal right and obligation.

Duguit, however, professing strictly to keep only to facts, tries to establish, what the corporation theory seeks to prove and explain, *viz.*, that there is really no conflict between the individual and the state or collective interests, and that they blend into one as "the full development of each one is the condition of free development of all "[1] and "the greater the freedom of the individual the stronger the bonds of society and conversely." It is on this fact of social solidarity, that he proposes to substitute for the fictitious personality of the state and social will of the corporationists, that Duguit bases his cardinal principle of legal right, duty and obligation binding as well on those who wield the power of political sovereignty as the rest. This objective principle [2] casts

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[1] *Cf.* the communistic manifesto of Marx and Engels, see Lec. V.

[2] Solidarism seeks to base its moral principle on the idea or fact of solidarity of men which results from their union and interdependence in society. By opening his eye to his obligations to the present and past generations of men for his physical, intellectual and moral attainments, for all that he has acquired and inherited and for all that he still wants and desires, it broadens the conception of the right of the individual and removes his antagonism to the state and his fellows. This idea of solidarity, Charmont points out, is an old one, conceived as early as the beginning of Christianity in the doctrine of the common punishment of mankind for the original sin of Adam and of universal redemption of the Christian community through the merit of Christ. It is however directly borrowed from Biology, being a principle of science governing the phenomena of life, which is made up of the solidarity, *i.e.*, association and interdependence, of the parts and functions of living organisms, and of biological evolution, wherein fitness for survival in the vegetable and animal kingdoms depends on and varies with the degree of association, mutualism or co-operation (sociability) attained by them. Solidarity is also prominent in the field of economics where the principles of division of labour, exchange and even of competition promote productive enterprise and profit of the manufacturer and producer as well as improvement and cheapening of commodities for the consumer. Many recent sociological thinkers and jurists, *e.g.*, Fouillee, Marion Gide, Durkheim

upon the members of the society the duty "to employ their material force in perfecting social organi-

Michel, Renouvier and others have sought to derive from this *fact* of solidarism the principle of ethics that men in society being mutually dependent are morally bound to aid and relieve each other and that what is originally a natural or fatalistic fact or principle of science does, as it should, evolve into a voluntarily accepted ethical principle of mutual co-operation in ethics and law. As to the nature of this dependence and obligation of the individual in society to his fellows and predecessors and to the society as a whole, see Charmont, translated in Vol. II, Legal Philosophy Series, p. 87; also Jethro Brown, Principles of Legislation, Ch. III. The mechanical solidarity of the molecules in a crystal wherein the individuality of each component unit is submerged in the totality is transformed into the higher solidarity of the social organism which instead of annihilating the individual rather contributes to his development. In the light of the solidarity taken as a moral principle, true individualism, moreover, ceases to isolate the individual but conceives of him as destined to live and develop as one of a group and to become a co-operative partner of other men.

Lion Bourgeois in his work on solidarity, pub. 1897, employed the theory in remodelling laicism in education so that while shunning orthodox and unscientific religion based on faith in a true postivistic spirit it could still have its own scientific foundation for public and private conscience and morals. It was hoped that the proper appreciation of this principle of solidarity would induce the wealthy and privileged classes to intervene with willing self-sacrifice for the alleviation of undeserved misery and suffering of the poor and depressed classes and thus avoid class strifes and bitter economic struggles, violence and revolution.

The defective character of the attempt of these solidarists to found moral rules on objective facts however becomes apparent, as Charmont points out, when we find that nature as it is, including its social solidarity, is morally indifferent. It contains elements and forces which represent, and are productive of, both good and evil, justice and injustice. It teaches selfishness as well as unselfishness. Nature and society are not always solidary, nor is solidarity always beneficial. Nature shows us not only beings who are helpful to each other; it also presents individuals living at the expense of others. In the social struggle there are the victors, the vanquished and the parasites. Solidarity would transmit the evils, the poverty and vices, of parents as well as their wealth and capacities to innocent children. One who is not pressed by any moral sentiment but simply proceeds on the principle of solidarity would feel tempted to avoid honesty, self-sacrifice, philanthropy and good faith whenever he finds them not conducive to his material interests or sees his rivals and competitors taking

sation by protecting the individual and in perfecting the individual by protecting social organisation.'' In course of time through increase of knowledge it is subjectively recognised in human consciousness and next expressed in custom and legislation and realised in society through coercion or force put at the service of the law by the state. Thus the "Law exists without, is above, and limits the

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advantage of his 'stupidity' for the furtherance of their own ends at his cost. He would contrive to employ the principle shrewdly to his advantage—to keep the upper hand, to make use of the service of others and to live and prosper at their expense.

These solidarists themselves admit that solidarity by itself cannot lead to moral and legal obligations unless we take it as a postulate that man has an inherent title to justice and wants it established in society as necessary for its equilibrium. Solidarity is desirable only as far as it conforms, or is conducive, to justice. Leon Bourgeois—De La Solidarite, p. 8. It is in the adoption of this postulate that solidarism introduces its element of idealism into science in order to derive, what in spite of what Duguit says to the contrary would be otherwise impossible, *viz.*, normative rules from the objective causal rules of positive science.

Duguit in elaborating his objective theory of Law distinguishes his solidarism from the general theory in so far as he does not propose to attach any moral value to it nor to deduce from it any ethical principle of action. Co-operation, he says, is obligatory because it is necessary as a fact and not because it is morally good; and conformity to solidarity is not a rule of ethics but a rule of law.

Duguit denies any subjective right in the individual derived from his manhood alone; but in his 'Droit Constitutionel,' quoted by Charmont in Vol. VII, Legal Philosophy Series, pp. 130-31, he reconstructs a sort of subjective right of the individual, *viz.*, to the freedom of himself performing acts of co-operation conducive to social solidarity without interference. There is therefore considerable force in the observations of Berthelmy, Geny, Hauriou, A. Mestre, Charmont and others that there is little difference between Duguit and the other solidarists. For after all, with the admission that an individual has a duty and right to render and demand services conducive to social solidarity and welfare and that arbitrariness, tyranny or oppression on the part of the wealthy and strong is illegal and unjust we find a vein of hidden moral sentiment of right and justice and unconscious idealism underneath a superficial cover of pseudo-positivism.

sovereign;" for the fact of social solidarity from which it is derived is independent of the will of any one or more individuals—the rulers or the ruled—in society. Duguit thus rejects the juridical doctrine of absolute sovereignty which places the sovereign or the state above the Law (advocated alike by the Austinians as well as by the Psychological school) and discards the theory of self-limitation of the state by law [1] as meaningless and illusory. No limitation, Duguit urges, is real unless it is extraneous; and limitation of the state's power by law can never be juridical unless law is placed on the solid basis of facts above the state.

His criticism of the doctrine of autolimitation of the state by Law.

Duguit's views have in their turn received their due share of criticism from all sides—from jurists who do, as well as those who do not, subscribe to the doctrine of the personality of the state. In the editorial note to the 7th volume of the Legal Philosophy series,[2] Mr. Spencer points out that "the solidarity which Duguit and Durkheim [3] both postulate to be a fundamental fact is far from being complete in actual social life which shows a great deal of misadaptation and want of harmony. Actual human society certainly presents no.....harmony and unity .....which can serve as a foundation on which to erect a positive social morality.....Duguit's 'one rule of law' is accordingly a fiction; his doctrine flounders on the rock of scholasticism it seeks to

Counter-criticism.

Mr. Spencer.

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[1] Promulgated by Jhering (and supported by Jellineck) as a palliative against the extreme conclusions of absolutism.

[2] p. xlvi.

[3] Durkheim is a solidarist. He however discovers a "social mind" which Duguit rejects.

Jethro Brown.

avoid." Prof. Jethro Brown refutes the proposition that governmental rule is not based on the social will but is really the rule of the stronger section by explaining that the strong can rule the society not by their individual power but only if they can capture the social will and identify themselves with it.[1] Prof. Vinogradoff opines that Duguit's doctrine is not provided with sufficiently definite attributes to enable it to act as a foundation for a system of law. "We may extend or minimise the part played by the organised commonwealth in the life and conduct of its individual members but it is difficult to see how even a socialistic commonwealth can get rid of the contrast between the personal and public, the social and the individual As a society organised for rule it is bound to assume the form of a super-physical person."[2]

Vinogradoff.

The problem of subjective and objective rights.

Closely connected with the debate round the question of the personality of the state and the solution it offers of the problem of the society and the individual is the other one about the subjective right of the individual and objective Law established by the state. The old theory of social contract founded such individual right on the contract which established the state and created the sovereign with power and duty to legislate and rule. It was this contract that simultaneously put limitations on the state's authority and cast upon it the duty of protecting the (natural) rights of the individual by positive law. The Law of Nature (philosophical)

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[1] He cites the case of Napoleon in support of his remarks. See Jethro Brown—Principles of Legislation, Ch. IV.

[2] Historical Jurisprudence, Introduction, p. 151.

schools based them on the inherent rational nature of the individual independently of the state. Later schools that flourished after the downfall of both offered solutions corresponding to their conceptions, mechanical, organic or psychological, regarding the origin and composition of the social fabric. Duguit proposed, as might be expected, to establish individual rights which would be above and independent of positive law on the "one rule of law" derived from the 'fact' of 'social solidarity.' Such right would therefore be objective, *i.e.*, derived from the objective solidary nature of the society as it is, and not subjective, *i.e.*, derived from the inherent nature form or capacity of its subject (the individual) or any consideration of his consciousness as to what it should be. No such inherent capacity, personality or power of the individual to hold legal right did in fact exist antecedent to the state and its supposition is as much fictitious and illusory as the personality of the state.[1] The fallacy arose, says Duguit, out of the exigencies of the original theory of social contract wherein "the individual makes reservations in his own behalf: there is a whole side of his personality which by remaining protected becomes inaccessible. The exigencies of this theory lead one to ascribe to the collectivity a borrowed personality, to regard the state in opposition to the individual as also a subject of the law. It has been possible at certain epochs for these doctrines to be utilised. They have furnished a means of limiting the absolute power of the state, of checking arbitrariness in

Duguit's theory of objective rights.

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[1] Duguit—L'Etat, Ch. VIII, pp. 1-52.

governments and tribunals and of greatly furthering the progress of public law. But like all artificial principles they lead to unsound conclusions. They falsely oppose the individual to the state so that whatever is lost by the one appears to have been gained by the other. They assign fixed invariable limits to the state whereas in reality these limits vary with the times, with the social environment, with circumstances and with the character of the citizens. They determine these limits negatively rather than by conferring positive attributes (*e.g.* as a cultural agency the exercise of whose power is equally for the benefit of the individual and strength of the society) upon the state. They are in contradiction to the law of evolution. Their claim that the rights of man can be fixed by immutable universal rules is incapable of realisation."[1]

Objections to Duguit's theory.

Duguit's solution of the problem is typical of the solidarists[2] except in this that he does not attach any intrinsic moral worth to the fact of solidarity.[3] It is set up as an objective fact in nature which issues no commands; but individuals as they understand it are impressed by its inherent qualities and come of themselves to abide by the rule, which is one of law and not of ethics, derived from it. It is like a child adapting his conduct with regard to the fire as he learns its dangerous as well as useful

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[1] *Vide* Charmont (Les Transformations du Droit Civil, Ch. XI) translated in Vol. VII, Leg. Ph. Series, p. 126, summarising Duguit's views on this point.

[2] *e.g.*, Fouillee, Gide, Durkheim, Bourgeois.

[3] *Vide* Charmont quoted at p. 126, Vol. VII, Legal Philosophy Series.

properties. Charmont, however, points out the impossibility of passing from fact to duty, from the enunciation to the norm,[1] *i.e.*, from a natural or physical fact to an ethical or legal rule. If, as Duguit believed, social solidarity is morally colourless, neither good nor bad, then individuals will utilise it as best they can only whenever it suits them and avoid it when it demands sacrifice or hurts self-interest, as one does with the fire; and so no "one rule" of conduct for all can be laid down on its basis in societies composed of men of infinite shades and degrees of temperament and culture.

The difficulty of deducing norms and duties from mere objective facts.

The same difficulty which stands in the way of deriving ethical (including the legal) norms from technical norms dependent on objective or physical facts (here the fact of social solidarity) also marks the defect of Duguit's attempt to explain subjective *rights* on the basis of objective Law. Duguit thinks that the so-called subjective law (rights) are logically derived from the objective principle of social solidarity. "Since every individual," he argues, "is obliged according to the principles of objective law to co-operate in social solidarity, it necessafily follows that he has the right to perform any such act of co operation and to prevent any one whomsoever from interfering with the fulfilment of the social rule which is incumbent upon him."[2] The opponents of Duguit would argue that the 'oughtness'

Same difficulty as to rights.

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[1] Legal Philosophy Series, Vol. VII, p. 129.

[2] Duguit—Droit Constitutional, p. 16. See this criticised by Charmont in Vol. VII, Leg. Ph. Series, p. 131.

of ethical rules and rights can never be wholly deduced from the "what is" of objective facts and their existing relations or from the social constraint that might be employed for them. It rests on the inner consciousness of the agent who feels inclined to obey the rules himself and to appeal to the law to have them obeyed by others. The initial difference between the positivists (and those who are trained to think in their way) and the rationalists or (in the larger sense of the term) idealists, including the psychological school, lies in the latter seeing this more clearly than the former. The positivistic solidarist would demur and fight shy of this *a priori* view of subjective right. But is he not himself guilty of an *a priori* deduction when he asserts that because the society is solidary every individual *should*, *i.e.* has a social duty to, promote it *for the benefit of the others in society* and has a *right* to its promotion by others *for his own benefit*? The solidary character of the society is an objective fact; but when its promotion is posited as 'good' or 'proper' or 'beneficial,' *i.e.*, an ethical value is attached to it, something more is added to the fact, and, however artfully disguised, this additional element will on analysis be found to rest on a subjective or *a priori* foundation like moral sense or conscience or a categorical imperative. Duguit points to the superiority of the demands of social solidarity in the everyday life of societies over those of the most elementary natural rights of the individual like right to life or property. This however only shows that our *a priori* conceptions of right must not be regarded as absolute but must yield and shift under

The objections of the psychological school voiced by Prof. Saleiles against Duguit's theory of subjective rights.

stress of circumstances. The latest philosophy of Law,[1] harmonises relativity with *a priori* truths through the principle of evolutionary realisation. Moreover, as long as society is made up of live individuals its structure and order are bound to proceed from combination between them; and if rights are assigned and limited by law, the latter appears on the other hand as a product of compromises and agreements which assume the technical shape of rights. The necessary renunciations and sacrifices are at bottom measures of expediency and of self-defence and their apparent opposition to individual aspirations is in truth the surrender of casual license for the sake of a reasonable assurance.[2]

The legal aspect of solidarism represented by the principle of quasi-contract.

The rights of the individual, like his duties, are based, in the solidaristic theory, on the principle of quasi-contract for things had and received.[3] We owe it to our fellow beings of the present and future generations to pay back for the heritage we have received from the past generations and the benefits we receive from our contemporaries, and we must allow the society to adjust our accounts and saddle us with our proper share of credit and debit, rights and liabilities, in view of these obligations. Persons favoured with excess of wealth, learning and power from or through, as it must be, the instrumentality of an antecedent solidarity owe it to those less favoured in that way to submit to extra

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[1] The Neo-Kantian Theory, see Lec. VII.

[2] See Vinogradoff, summarising Saleiles' argument in support of this psychological conception of individual rights as opposed to the positivistic sociological or solidaristic conception of Duguit—Historical Jurisprudence, p. 151.

[3] See Bourgeois—Solidarite, p. 133. Bougle—Solidarism, pp. 65 ff.

demands, *e.g.*, in the shape of taxes, to indemnify those who have suffered injury or to compensate for social inequalities. It is thus not mere charity but strict justice that the rich should yield at least part of their surplus to aid the poor.

Objections to the principle.

This doctrine of social quasi-contract has however been objected to[1] as vague and unworkable. It is fallacious because neither the past generations nor our contemporaries ever regarded themselves as our creditors. They had and have lived and worked for themselves and neither they nor their descendants can justly claim any recompense for any incidental benefit that we may have derived from what they had done primarily for themselves. They had handed down to us not merely assets but also burdens, curses and evils. There is moreover no definite measure of fixing the proper share of social duties for each citizen, and for assessing their value, when there are so many creditors and debtors[2] and as many counts or heads under which the past benefits mutually exchanged might be catalogued. If the state be left to be the sole arbiter of the matter it may under the pretext of striking a balance fix any liability it chooses to the disregard of all fairplay and justice and of all individual rights.[3]

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[1] By Charmont, Malapert, Tarde and others. See Vol. VII, Leg. Ph. Series.

[2] Each individual being a creditor as well as debtor to all the others in society on this principle of social solidarity and quasi-contract.

[3] Prof. Demogue also rejects, like Charmont, this theory of social quasi-contract set up to justify solidarism and its interventionist policy, and substitutes another based on the necessity and idea of (*a*) division

Comparison of French solidarism and German psychological theory.

The French Solidarists and the German Psychological school alike seek to find a *via media* between the extreme tenets of individualism and collectivism. They equally propose to solve the problem of the individual and the society or state and discover principles of their correlation, co-ordinating the interests and aspirations of both, from social facts instead of

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Demogue substitutes for quasi-contract the principles of apportionment of loss and minimum subsistence.

of risks and losses of individuals among a large number, and (*b*) securing minimum of subsistence for all, in society. It is an elementary fact that losses are easily borne if they are apportioned among a large number of men, *e.g.*, through insurance; and it is the real necessity of such apportionment, and not any imaginary quasi-contract (which is worse even than the long-exploded social contract), that is the correct basis and justification of the solidaristic teachings. It is much better fairly and openly to say that whenever a loss is suffered either by a disaster or an accident or even by a foreseen cause like old age, the burden of it should be apportioned among several and thus lightened for the sufferer; or rather that (and this is another formula which has special consequences of its own) every human being should be assured a certain minimum of subsistence. Solidarism tends to equality by a certain pooling of losses sustained. It encourages state intervention for raising taxes so that the small amount so raised from everybody (who can easily bear the charge) may be spent for the benefit or support of a large number of persons. The advantage may be general or public as in the case of a new road, railway or a new state institution, or to a large number of needy individuals as in the case of pensions and insurances opened or established with the fund raised by taxation. The same principle also justifies laws providing for the participation of the state in public works and giving public aid to private organisations. In private law also, *e.g.*, for private associations, joint-stock companies with limited liability, in acts to provide for workmen suffering from work-accidents or for losses by sickness and unemployment, the same principle applies, *viz.*, that of dividing the liability in order that the loss may not fall on one or a few. Demogue points out that law courts often adopt this principle of compromise and division of loss even where the law does not expressly provide for it and lean towards finding fault with both parties in case of accidents, collisions, etc., so that the burden of the loss may be divided.

From the other point of view, from which also solidarity may be supported, according to Demogue, without fiction, *viz.*, the necessity of guaranteeing minimum subsistence to all, solidarism may legitimately

*a priori* assumptions or postulates of reason. Both however recognise that the psychic elements of human nature are indispensable factors of these social facts as also of every sound sociological theory.[1]

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claim to substitute in the place of the theoretical right of every man to the highest dignities and fortunes, the practical and realisable right not to die of hunger. Legislation in this direction would effect socialisation of law inasmuch as it takes into consideration men of all social positions, high or low, the rich and the poor, and specially the latter. Solidarism will justify itself if it can thus replace the abstract generalities as to the right of the individual of the Law of Nature regime by concrete, workable and realisable rights calculated to mitigate the sufferings of the needy and helpless.

Weakness of Demogue's theory.

Prof. Demogue, however, himself notices the weakness of his own doctrine of division of losses—the difficulty and danger of its being pushed to the extreme and defeating its own object. The community may be harassed by excessive intervention of the state and multifarious taxation. The business enterprise of the individuals, *e.g.*, the capitalists, will be checked if they are made liable for the various forms of loss for which they are not morally responsible. The parties for whose benefit the solidaristic measures are introduced may in their turn grow idle, irresponsible and possibly fraudulent if they are indulged into believing that the law will make others bear the burden of losses arising out of their shortcomings. A great portion of the national energy, resources and time will have to be devoted to the working out of this *division* of losses and *regulation* of complicated interests (claims and counter-claims of individuals) which might and should have been more profitably directed towards social *production* for the greater benefit of all. *Vide* Demogue—Fundamental Notions, Leg. Ph. Series, Vol. VII.

[1] See note 3 under pp. 24-26 for Duguit's disguised idealism, and the open admission of it by the other solidarists. The latter recognise the indispensability of moral considerations in order to improve upon the soulless solidarity in nature. Leon Bourgeois presses upon the society the duty of organisation calculated to mutualise the advantages and risks of natural solidarity (La Solidarite, p. 49). Demogue puts it in stronger terms :—" What is proved by the fact that solidarity exists in nature which commands man to conform to it—a being of unique species, the master of lower beings? Has he not rather reason to depart from it, if because of this solidarity nature sacrifices whole species so that others may find their essential conditions of life?" (Leg. Ph. Series, Vol. VII, p. 285.) He admits that the social provision for the division of losses " is not borrowed directly from the confused

Each works out a theory of law and policy of legislation that neither permits unequal and merciless contract and competition in the name of freedom nor encourages wholesale expropriation of individuals and nationalisation of enterprise. Both would subscribe to an interventionist policy of legislation and find out the rationale of the state's authority in that direction and its limitations. The German theory, however, was matured in a metaphysical soil and in an atmosphere of strong national craving for organisation, efficiency and power inside an absolutist state. It accordingly readily discovered a real will in natural groups, corporations and societies which is metaphysical. It raises the state to the supreme position as the highest all-embracing society and ascribes to it an absolute will, personality and sovereignty which is only softened by a hardly definite and obligatory principle of auto-limitation. The personalities and wills being distinct, there is yet, in this theory, room for conflict between individuals and groups and between both and the state—a rivalry of their rights and interests—of which the state itself is the supreme arbiter. On the other hand, the French theory, truer to Comte and his method, rejects the

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variety of forms which nature presents but it responds to reality and to *certain aspirations of the human soul.* It mingles the real and the ideal." (Fundamental Notions, Leg. Ph., Vol. VII, p. 532.) We thus see that purely positivistic sociology and jurisprudence has had its days and has now been outgrown. The tide has now turned again in view of the fact that objective science is unequal by itself to the task of guiding human aspiration towards proper channels without some ideal to guide it. Objective nature has got to be controlled and regulated and its defects have to be remedied by the effort of men in the light of some ideal drawn from higher regions.

metaphysical group-personality as a fiction. In the first stages, it did not even recognise the state, nor seek its intervention in the affairs of the individual; but called upon the individuals themselves to re-adjust their own affairs and to terminate all opposition between the individual and the society in the light of social solidarity. But this was impracticable. The state was latterly given an executive or administrative character to ensure the operation of a moral code based professedly on social solidarity and quasi-contract but really on the intuitive sense of social justice and sentiment of equality and fraternity characteristic of the French race. In consonance with the communistic spirit of the nation, solidarism merges the state in the society and subordinates it to Law which, evolved out of the natural principle of solidarity, was binding alike on the state and the individual. All the rights and duties of the individual are thus taken and estimated in their social aspect, *i.e.*, as social rights and duties, as rights or duties of the society towards him. There is thus no distinction, in this theory, between private and public rights, no opposition or conflict between subjective right of the individual and objective law. In the German theory the state, and in the French, the individual is yet the primary factor. In the former, the liberty and interests of the individual are promoted for they are conducive to the strength and welfare of the state. In the latter, the group is meant for and has got to be promoted in the interests of the individual, in gratitude and dutifulness for its past, and in hope of its future, contributions to the life and prosperity of the individual.

The German theory enthrones the head and the will, the French emphasises the heart and the emotions.[1]

Pragmatism has been a more recent theory, or rather programme of action, thrown out by some exponents of sociological jurisprudence as a method of tackling the several modern social problems for which it is difficult to find out any comprehensive scientific or metaphysical explanation acceptable to all. It is not a doctrine or theory by itself, but it helps us to detect the right theory when we are in doubt about it. Its precept is "Judge an idea, a principle, or a rule by its results, *i.e.*, by what would happen if and when the idea or rule is actually adopted in practice." No argument in support of the truth or merit of an idea or a course of action can be stronger than that drawn from its actual consequences. This method is one that may be applied everywhere, in the domain of jurisprudence as well as in other normative sciences. As examples of this pragmatic method applied to find out correct answers to concrete questions of legal philosophy, sociology and religion we may have these :— Pragmatism.

Q. "Is there a free-will?

A. "We find that the supporters and opponents of free-will equally conduct themselves in life as though they believed in freedom and not in fatality. This shows that of the two principles, that of free-will works out better results. It is accordingly true; or we must take it for our science of law to be true without any further idle speculations as to its metaphysical or scientific proof."

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[1] *Cf.* also Lec. V *re* German Socialism *vs.* French Communism.

This may be taken to point out the Kantianism of Pragmatism which subscribes to the doctrine of autonomy. Take another :

Q. " Is it right that the wicked should be punished in the other world?

A. " Those who believe in punishment of the wicked after death do behave or are sure to behave better than those who do not. Hence the answer is in the affirmative." The idea sought to be tested is thus pragmatically found to be true.

William James, the chief exponent of the doctrine, applies his method also to questions like these :—" Is the doctrine of salvation true?" " Is there a future life?" to find that both of them must be assented to as pragmatically established.[1]

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[1] I may here also refer to Maurice Blondel's religious philosophy wherein he justifies the existence of the supernatural by its necessity, by the usefulness of a belief in the supernatural in our everyday life and activities. He points out that we in our actions and expectations often exceed the data of science and experience; we achieve sometimes more and sometimes less than what these data would appear to guarantee; our desires are not always commensurate with our power to achieve, and we thus impliedly accept in our dealings "man proposes but God disposes " as a practical and useful maxim of life. Curiously enough he also characterises his doctrine as " pragmatism," but (not having noticed the term used previously by any other person) in the belief that he had coined it himself.

There is also a good deal of pragmatism in the philosophy of Bergson, " the new Spinoza " of France, whose treatment and support of " intuition " as a source of finding out the truth and as a useful and reliable guide in practical undertakings, specially in projects of reform, has, according to Kohler, infused a new life into the metaphysics of history, and is expected to be of great importance for the jurists as is shown particularly by the immense influence " intuition and pragmatism " had really exercised in the development of the jurisprudence of Rome and England. See Kohler—Bergson and Die Rechtsphilosophie referred to in Vol. VII of the Leg. Ph. Series, p. 384; also Bouideau—Pragmatisme et modernisme, pp. 153-159).

Pragmatism is an amalgam of many principles.

I have just told you that Pragmatism discloses its Kantian element by its views on the question of the natural right of the individual to liberty. The fact is that Pragmatism finds to be true by the application of its own practical method what Kant had established by his critical philosophy. We may add that Pragmatism is so far as it considers theoretical (pure) reason to be blind and useless and relies on the unerring decisions of the practical reason really takes its stand on the philosophy of Kant which conceded only to the latter the privilege of peeping into the secrets of transcendental truth. But we may as well speak of it, in the words of Charmont,[1] as " a continuation and extension of empiricism, utilitarianism, positivism, Kantianism, voluntarism (Schopenhauer) and fideism (Pascal) ;" for (and again I quote the same author) " To judge a doctrine by its fruits is to act empirically, is to let experience prevail over reasoning. To consider as truest and best whatever doctrine conforms the most nearly to our needs is to carry utilitarianism to its farthest extreme. From positivism Pragmatism borrows its concept of science : to know in order that we may foresee, to foresee in order that we may perform. It borrows from the same source a disdain for metaphysics and pure intellectualism."

It assigns the role of importance to the will, as taught by Schopenhauer, on account of its influence

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[1] See the Chapter on Pragmatism translated in Vol. VII of Leg. Ph. Series, p. 182.

on the intellect, and no less to the heart and its craving for religion, as taught by Pascal; for "the heart has its reasons which the mind does not know."

Its merits and defects.

In fact we are all pragmatists more or less, for no one can wholly avoid examining the compatibility of an action with its conditions and ends. Pragmatism in the matter of juridical and legislative reform has taken firm hold and made rapid progress in England and America. Charmont points out the claim of Pragmatism to be regarded as a means of reconciling the demands of idealism and of action. I should rather call it a *via media* between intuitionalism and utilitarianism which avoids the arduous and impossible task of calculating the utility of actions by taking the help of intuitional foresight. It attempts to support this process by a somewhat crude philosophy and logic. It fights shy of the highest metaphysical postulates and ideals of reason as also of the truths claimed as irresistibly established by science and of shaping conduct in view of their teachings unless and until its pragmatic sense is satisfied. It exhibits a want of passion for them when they do not easily accord with commonsense and intuition. Instead of counting the pragmatists, as Charmont apparently does, as a set of new adherents, among the modern sociological jurists and theorists, to the tenets of idealism, it is more correct to regard them as deserters from the orthodox positivist camp, who help the cause of idealism, only indirectly, by throwing doubts on the wisdom of strictly following nature and history as disclosed by science in the concerns of social and legal reform. In pointing out the defects of

Pragmatism Charmont well observes:—"We go to the extreme if we attempt to free ourselves from the control of the reason. We but deceive ourselves if we confuse the true and the useful. If we must believe in the objective import of truth before we can think or act 'we may find,' to quote Pasodi, 'that it is pragmatically impossible for us to limit ourselves to pragmatism.'" [1]

synthesis of methods.

I turn now from these constructive and synthetic attempts at solution of the sociological problems of our day to the other topic of 'synthetic method' which is also attracting a good deal of attention in modern times. There is however a fair degree of unanimity, at least in the scientific camps, that so far as the gathering of the materials of study is concerned the comparative method is the most comprehensive and profitable. The older Analytical and Historical methods, each originally limited within narrow boundaries, had yielded conclusions (*e.g.*, those of Austin and Savigny) which appeared to be as irreconcilable as the methods themselves were. The modern comparative method has shown them how both may extend their scopes of enquiry so as to unite together and constitute the one scientific method of our day.[2] The comparative method

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[1] Vol. VII, Leg. Ph. Series, pp. 104-5.

[2] It is true that the old-fashioned Austinians still survive; but they also have (see Lec. IV) their minor amendments to make to the original definition or theory of Austin; and it is clear that the researches and teachings of the Historical school and of their sociological successors have exercised considerable influence in reforming the method, widening the horizon and suggesting the amendments of these followers of Austin. The sociological tendency and, more clearly still, the comparative method may be noticed, in a more or less marked degree, in

itself, in so far as it is employed to find out the general lines of development of socio-legal human institutions, has had to face cogent criticisms levelled

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Pollock, Bryce, Maitland, Vinogradoff, Jenks, etc., though these jurists of the English school have not yet been induced thereby to take their rank among the typical sociological jurists nor (excluding the Neo-Austinians) to accept the personal theory of the state.

As regards the Historical school, their enquiries, originally limited to the historical reconstruction of Roman Law, gradually widened; and now there has been a practical merger of the historical method in the comparative. History as a science received its latest and greatest impetus when it assimilated the Darwinian idea of evolution so that the facts of the history of the diverse human races could be sorted and pieced together so as to constitute the universal history of socio-legal ideas and their development. Though it was impossible by this process to find out the origin—the first cause—of Law, it was expected that the universal truths discover by induction and generalisation would approach the ultimate and absolute philosophy of law at least sufficiently so as to serve as tests of the accuracy or otherwise of the *a priori* conclusions of the metaphysical philosophers.

Even the philosophical schools as we have seen in the last lecture, produced notable exponents of the comparative method which thus became the medium of union, or at least of rapprochement, of the schools as well as methods.

The Austinians of these days are all, in various shades of combination, Analytico-Historical jurists with a touch of the sociological influence. The same combination of the analytical and historical methods, flavoured by a much larger dose of sociological ideas, is found in the modern continental theories that I have discussed. Jurists who thus shun the higher philosophical flights and proceed more or less along the positive method of Comte without going to the length of denying causality to the human will and combine the analytical and historical methods in their extended forms for gathering their materials and making their generalisations, constitute what is popularly known as the Comparative school. The comparative method, however, is not the exclusive property of that school for it has, as I have often repeated, been adopted and utilised with profit by all the modern schools of Jurisprudence. In some the analytical element prevails over the historical and philosophical, whereas each of the other two elements prevails in turn in the other forms of combination of methods as will appear from the charts appended to this volume.

against part of the procedure adopted by several of its greatest exponents and many of their earlier conclusions.[1] In fact there has been a ferment over the methods of science, their difficulties and limita-

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[1] Prof. Vinogradoff (see his remarks at pp. 147 *et seq.* of Historical Jurisprudence—Introduction) has felt it necessary to undertake an elaborate reconstruction of "Historical Jurisprudence" which he proposes to build up indeed on the comparative method, which cannot be eschewed, but after elimination of its errors many of which his predecessors like Maitland in England and Jellineck in Germany had pointed out with the greatest force and lucidity. The brilliant generalisations of Maine about the ancient Law of Persons and Things and about the traits of early human societies which this great jurist purported to have derived by historical and comparative research, *e.g.*, those regarding agnatic kinship, patriarchal family, village communities and the various stages through which they passed into a community of individual legal persons and proprietors, have been controverted by Maitland (see Collected Papers, Vol. I, p. 285); and the errors have been attributed to preconceived assumptions not sufficiently tested by facts, lack of careful investigation of the sources, and hasty blinking of individual cases which appear to destroy the generalisation sought for. Maitland would call for a bold examination of such cases (with true scientific readiness to admit them as exceptions if they prove to be so even at the cost of giving up the generalisation if that becomes impossible) and for pursuing the enquiry into greater details till a better generalisation is arrived at. The defects of the historical and comparative method as employed by Maine are also noticeable in the facts and conclusions gathered together in the works of the ethnological jurists like Kohler, Poste, Kovalevsky and others (*vide* Vinogradoff—Historical Jurisprudence, pp. 149-50), but, as pointed out by Prof. Vinogradoff they are inevitable in "preliminary surveys on broad lines."....." It is high time however to take our stand on the careful analysis of one or the other particular rule, relation or institution, its formation, development and decay tested by the facts of comparative Jurisprudence." We should learn to avoid indiscriminate collection of facts—" a tendency to put together things which are really unconnected." We require " A careful study of individual cases and in the study juridical analysis ought to receive more attention that has been the case hitherto." Thus Analysis and History must be co-ordinated in Science with careful attention to each; but the question yet remains whether even this is sufficient and the most modern view is that it is not.

tions, almost as acute as that over its conclusions. The general trend of opinion is steadily becoming stronger that the methods of science and philosophy—induction of experiences and deduction of reason—must be co-ordinated; and highest modern thinkers have been exercising themselves as to how best to secure this co-ordination.

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# LECTURE IX.

## Recrudescence of Idealism in recent Juristic Theories—I.

### *"The return to Kant" (or Fichte)—in France.*

Our age acknowledges the necessity of (*a*) the ideal (philosophy of reason) and (*b*) its logical proof (scientific induction?).

One outstanding feature of this age of synthesis —compromise or unification—of jural theories and methods is the general and steadily growing impression that some form of idealism, *i.e.*, the acceptance of some ideal principle of right and justice established *a priori* or independently of experience, is indispensable in a truly synthetic and sufficient Philosophy and Science of Law. It is now generally admitted that even the highest generalisations of Science based on the most comprehensive collection of objective facts, past and present, cannot, without the assumption of some such *apriori* test or principle, adequately explain or determine the true nature, or the moral worth, of human volitions. Materialistic or positivistic Science, unaided by idealistic Philosophy of reason, cannot yield any satisfactory theory of psychic and ethical facts with their necessary implication of free personality and will, nor truly and effectively, *i.e.*, by commanding respect, guide social and individual conduct. At the same time it is felt that this idealism, so that it may have real value, must be of the right sort, with its truth or validity justified and brought home

The problem and its difficulty.

to us by the logic of reason. The initial difficulty, however, that stands in the way of its justification in this positivistic age is the want or impossibility of what is called Scientific 'proof' of the ideal element.[1] It may after all, the positivist would say, be a creation of man's imagination, a myth; and, if so, it can neither logically strengthen nor disprove the worth or validity of a rule of action prompted by the mere sense of utility—the appetitive side of man—guided by Scientific foresight. Idealism, would, in this view, be not only unscientific but valueless and misleading.

Previous solutions unsatisfactory.

The 'idea' or 'ideal' of the Rationalists and Metaphysicians was besides incapable of practical realisation in life, and the recognition of this defect led the later philosophical schools[2] to lay down relative and evolutionary ideals suited to each age and society. Conversely, the scientists who saw that moral rules guiding human will to just and right determinations could never be evolved from the mere data of natural facts and forces which are ethically colourless, sought to find from the higher plane of intellect and will (now regarded as amenable to scientific investigation) an ideal principle or standard of justice superior to those derived, as before, from the lower planes of organic life and its

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[1] In other words, it is the impossibility, through logical inconsistency or incongruity, of proving that the ideal is not ideal but real. The 'ideal' is opposed to the 'real' of the scientists, the real as a phenomenon, *i.e.*, the real in experience. The reality of the ideal is ideal reality or truth, which, independent of and transcending experience, judges the reality, worth or truth of experience itself.

[2] *Vide* Lecture VII.

environments. They hoped that by subjecting the higher mind to scientific analysis they would find out some explanation of the "free will" that is capable of rising above the immediate biological craving and sense—attraction for objective interests so that the moral judgments and standards of psychological ethics and Law may have some real meaning and value for man. In this way, the synthetic tendency brought about the rapprochement (besides that of the Analytical and Historical and of the Individualistic and Sociological Schools discussed in the previous lectures) of the *apriori* and *aposteriori* —the rationalistic and the positivistic—Schools; and the exponents of idealism and realism tried, as we have seen, steadily to come to an understanding with each other. But this understanding has not been complete. The "free will of man" as the modern Psychology has ascertained it, is not the transcendental or ideal "autonomous will" of Kant. It is as much determined by causes as every other product of nature. The only peculiarity of the human *psyche* is that it has inside itself an inherited and acquired fund of energy or force so complex in its composition that we cannot easily calculate beforehand how an individual will act under a given set of circumstances as we can do with regard to a planet, a plant or a lower animal. Given a choice of conflicting motives I am said to be free to select one and respond to its call and turn a deaf ear to the other and resist its influence. But in fact, according to scientific Psychology, the choice is not free but is determined by the peculiar composition

**The Psychological account of free will**

**is deterministic.**

of the energy or force stored up in my psychic and moral nature. Given a sufficiently complete account of the peculiarities of this constitution of an individual (or nation) we can approximately predict how he will act in stated circumstances and it is this fact that has rendered mental and moral sciences possible. So you see that the positive or scientific philosophy of Law, cannot, even at this, its psychological stage, explain moral judgments on the right and justice of human acts. It may at most describe the causal complex of antecedent forces that have constituted the psychic nature of the moral agent, and assess it, as it acts in response to environments, in terms of utility, *i.e.*, pleasure or pain, individual or social, produced by such acts.

**Hence, room for further solutions.**

There was thus room for further attempts at bridging over the time-honoured gulf between idealism and naturalism, *a priori* and *a posteriori* truth, freewill and determinism, so far at least as they were relevant to the Philosophy and Ethics of Law ;[1] and I shall now proceed to describe and discuss, somewhat elaborately ôn account of the extreme interest and importance of the subject, some recent notable contributions in this direction.

Fouillee (1838-1912), a prominent leader of modern thought in France, attempted to overcome the antagonism of " Liberty (or freewill) and Deter-

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[1] The ferment created by the question of individualism and collectivism and the allied problem of subjective right and objective law, discussed in the last lecture, naturally offered an incentive to the resuscitation of the deeper problem discussed in this and the next lecture.

minism" by his philosophic theory of "Force-Ideas" which he first expounded in his doctorate thesis on the subject in 1872 and afterwards elaborated in a long series of works till the end of his life, with reference to its applications in Ethics, Law and Politics. In the department of legal philosophy[1] he sought to support the French ideal of Liberty[2] which he asserts to be the indispensable foundation of the modern conception of legal right[3] and to justify this ideal on grounds acceptable to deterministic science.

Fouillee.

His thesis on "Liberty and Determinism."

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[1] *Vide* Leg. Phil. Series, Vol. VII.

[2] Fouillee points out that Germany, England and France had each their national ideals. "The ideal of Germany was primarily—at least originally—religious and metaphysical; that of England was primarily political and economic; the ideal of France was primarily social and humanitarian" (the Modern Idea of Law, Ch. IV). The dominant ideas since the French Revolution which have been punctuating German, English and French thought (says Fouillee) are respectively "power," "interest" and "ideal right" expressed in 'liberty, equality and fraternity'"; the first two have followed a realistic trend which in Germany inclined towards Socialism, absolutism and militarism (power), in England towards utilitarianism and industrialism (interest) and the third adopted an idealistic trend manifested in communism and humanitarianism (ideal right or liberty).

[3] On a comparison of the ancient, *e.g.*, the Aristotelian or Greek and the modern (and peculiarly French) conceptions regarding the physical and human worlds, Fouillee concludes that the change of ideas has been from one of an absolutist and centralised closed sphere controlling all particulars within it to that of a decentralized infinity of particulars cohering through or under a universal immanent force or principle, that originating from, as well as controlling, each and all of these particulars keeps them together as a system. Instead of the great crystal vault of the sky enclosing the stellar universe with the earth as its governing centre, we have now the infinite universe of the modern science of which, as well as of the force which controls it, the centre is everywhere and the circumference nowhere; and instead of the ancient conception of the absolute (monarchical or

At the outset Fouillee explains that the above conception of legal right is essentially a product of the modern era,[1] but unfortunate-

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oligarchical) natural state with the subject individual wholly dependent upon it for the whole of his value and all his rights we have in the social and moral world the modern conception of a universal republic to which all particular groups are tending, by expansion beyond their own into the spheres of the other groups, to lose themselves and in which the "true law is no longer the mere will of a prince or the interest of a people; it is the right of all mankind." As a result of this "the centre of law is everywhere, and each individual may be considered in turn as end or means, as obeying or commanding, as subject or legislator in the universal republic." It is the doctrine of absolute legal right based on the dignity of man as man: the principle of moral freedom considered as absolutely inviolable.

[1] Fouillee points out, following Rousseau, that the Platonic derivation of Law from the "nature of things" fails to distinguish natural law and social laws—*i.e.*, laws of what exists and laws what should be—those describing material things and their relations and those guiding and controlling human will and volitions. The stoic derivation of Law from universal reason leads only to abstract formula and lays no foundation for real law; the Christian religion derived Law from God and human rights from the common fatherhood which constituted man's sole claim to mutual respect and universal brotherhood. This was no inherent right in man *qua* man but such as rests on a borrowed or attributive value which the Godless or Unchristian individual would forfeit. The Law would not protect such individual. The philosophy of the 1700s substituted for the dogma of transcendent divinity—of the supernatural origin of man's titles, *i.e.*, of individual liberty and other rights, vouchsafed and limited by grace, and subordinated to the interests of eternity (eternal salvation or damnation dependent on the acts of man in the exercise of the temporary liberty vouchsafed to him by God's grace)—that of divinity immanent in man, of respect for man for his very humanity, of rights based solely on human nature itself and regarded as ends in themselves. Christianity admitted no right but only duties before God, and *a fortiori*, no equality of rights in the Kingdom of God as that would clash against the doctrine of Grace. Christianity admits hierarchy and inequality even in the Kingdom of God and hence it tolerates and is even conciliated to similar inequalities in the Kingdom of the earth. Its view is that such inequalities are transient and much should not be made of them by way of complaint. The real worth of the indivi-

ly, neither the rationalists nor the scientists of this era have succeeded in demonstrating the conception. He analyses the freedom of will on which the modern philosophy of Law has built up its theory of legal rights and holds that this freedom cannot be the freedom of indetermination or, in other words, the freedom to will contraries; for that is wholly impossible and without moral value. Freedom from the influence of motives of all kinds, good, bad or indifferent, is soulless, and like that of a steam engine without any one to guide it, is capable equally of good and evil. Nor can it be the freedom to choose between opposite motives without anything by way of principle to guide the choice, for that also is hardly superior, from the point of view of moral value, to the freedom of in determination. Besides its utter moral worthlessness such freedom is moreover demonstrated by science to be nowhere in the world which is one of effects without any first cause. Human volitions are always influenced by motives and the motives

Fouillee's criticism of the rationalistic view of freewill regarded as the foundation of legal rights.

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dual, or the value of his aspiration for progress, liberty or freedom of conscience lay in his religious side and not in his social—civil and political sphere. Even in the matter of religious conscience the individual was subject to the religious control of the church and its god. The rebellion of individual conscience and the assertion of knowledge based on individual conscience and experience against the abuse of clerical authority and the demands of faith ushered in, through and after the Reformation, the philosophy of Descartes which enshrined and placed at the top, above faith and above the Church, the testimony of the individual himself and his own nature and dignity as a free human being upon and from which alone the legal rights of man to liberty, equality and fraternity were based and derived.

themselves are resultants of antecedent causes like character, education, circumstances, etc., of the individual, society and race, and are thus attributable to combinations of forces and interests, transformations of egoistic and altruistic instincts and evolutions of individual or social organisms which go back in an infinite series of effects and causes. F'ouillee accordingly concludes that the rationalistic philosophy of Law which bases rights on the free nature of man is alike mistaken as to the assumption of freedom (of human nature and will) which does not exist, as also about its moral worth which is nil; and is, by itself, *i.e.*, in the absence of some ulterior end of such freedom, inadequate to offer any valid foundation for a theory of legal rights.

**His criticism of the naturalistic or positivistic theories of Law.**

Turning round to the naturalistic or the deterministic (positivistic) theories of law that since Comte gradually usurped the juristic world of thought and supplanted the inflated rationalistic ideas about human freedom and reason, Fouillee finds that the positivistic philosophy, as had been admitted by its founder, confers no rights but only creates duties for the individual in society. The individual, according to the sociological view, is solely a result of causes. His volitions and actions are no more his than the motion of the projectile is of the projectile. Both are equally caused by forces traceable to foreign sources which again in their turn are found on analysis to be caused by other remoter centres of transmission (of force). This doctrine accordingly leads to fatalism; it refuses to attribute any truly active or causal (*i.e.*, as a first

cause) value or force to human personality, holds man to be a more passive agent that "rises and falls passively in the moral medium higher or lower, according to a rule analogous to the principle of Archimedes, as a body rises or falls in the air according to the expansive force which sustains it."[1] The individual is wholly denuded of any intrinsic moral worth or dignity so as to sustain any *personal right* and the social problem or the theory of law and right in reality becomes a mere "complex calculation of forces and interests" and the conception of everything else about natural or inviolable rights and responsibility is "reduced in all particulars to a mere metaphysical or theological illusion." Fouillee accordingly rejects the positivistic theory as wholly destructive of 'rights' and moral responsibility of man.

Summary. The difficulty of the problems created by the defects of these rival positions is thus summarised by Fouillee himself:—"On the one hand we do not see how a being without any kind of moral freedom can have rights properly so called; on the other, we do not see how freedom at least as it is ordinarily understood by the spiritualistic school can confer any rights. Hence if the philosophy of "moral law" (Kant) is to be maintained in as far as it is plausible, against adverse doctrines, it must explain

[1] Legal Philosophy Series, Vol. VII, p. 161.

more precisely what it means by freedom and must find a conception of it distinct from indifference of will and from fatalistic necessity."

Right meaningless without (1) freedom of will, and (2) its own inviolability which go together.

In rejecting the strictly deterministic theory of the positivists, Fouillee very acutely founds rights on the moral freedom of man and the dignity and respect which human personality, on account of its moral freedom, possesses and commands; for Right, Duty or Responsibility would be meaningless for one who has no choice, no independence to select and follow at his will one of several courses of action open to him. He further points out that a right, truly so called, must connote its inviolability; for otherwise it ceases to be a right. A provisional or conditional right dependent on some higher principle (*e.g.*, the interests of the society or of the stronger section of the society) which is regarded as higher than the dignity of the free personality of man—one which can be alienated or annulled at any moment whenever 'force' or 'interest' of the majority or the stronger in society demands it—is only permission, tolerance or favour of the society or the sovereign and no right at all. A right in order to be a *reality* must be absolute and inviolable even if opposed to all possible forces and interests; but at the same time its only foundation and justification must be established by proof of an equally real and absolute moral freedom of the individual who claims it—freedom which by proof of its reality and moral worth would naturally carry its dignity, respect and inviolability. Thus, according to Fouillee, freedom and right go together; and the

problem is how can a theory of right based on the free nature of man be established and supported in face of the truth demonstrated by the determinists and naturalists that individual freedom in this world is a myth and is morally worthless even if it were not so. The real objection to Kant's doctrine which conferred upon man, in the name of his *nature*, unconditional independence and inviolability so long as his will does not encroach upon that of the others is that it assumed as a fact that man is free by nature, that is, he is not only an end in himself but also a self-acting cause. But man in actual life does not in reality possess the supreme and absolute dignity of self-acting causality but is determined in his actions by motives and senses.

Fouillee finds the solution of this difficulty by holding that law, right and freedom belong to the ideal order and not to the world or order of actual and present realities.

Freewill and (inviolable) right are verities in the ideal order of things.

We all have, from the very first, the ideas (or ideals) of freedom, personality, right and inviolability in our minds which although they do not represent present realities in the world of objective experience, nevertheless, exist in thought and exercise potent influence in controlling and guiding the movements of individuals and nations towards their progressive realisation *in future*. We cannot despise the idea because it is not real; for no practical effort is possible without the ideal. The consideration of the ideal is as indispensable to the jurist, politician and social philosopher as the study of pure geometry and its ideal straight lines and circles is

to the mechanician. Personal right and freedom, although they are not real experiences or deductions from facts, are legitimate ideals in social science and jurisprudence; for it is by their theoretical assumption and acceptance in law that free or *voluntary effort* (without outside coercion) of the members in society, on which perfection of society has been proved to consist and depend, can be enlisted for the realisation of all possible good (social as well as individual). Moral good or perfection freely realised by the individual's voluntary effort is more lasting and has greater intensity than when forced upon him by external compulsion, and is more vitalised and fruitful of other goods;—in fact, it is superior not only in quantity but also in quality to good imposed by outside restraint and compulsion because it alone is consciously felt and loved and produces happiness. Freedom conceded to the will creates and nourishes conscience in the individual and a nation worthy of the name is a voluntary union of consciences, not a forced aggregate of blind and passive motives.[1]

Their influence on the world of realities.

True interpretation of freedom of will.

Freedom of the individual from external constraint, however, cannot by itself be productive of good unless the will is internally free from the overpowering influence of base, selfish and sordid motives. The greater is the freedom of the will of the individual from inferior and external egoistic and material motives (*e.g.*, of personal necessities, passions, of self-aggrandisement prompted by

[1] Philosophy of Leg. Series, Vol. VII, p. 172.

pleasures and comforts derived from exclusive appropriation of the external objects of sense which isolate and set one in opposition to others in society) the more will it attain to the natural spontaneity of the rational will and act freely under the higher and more universal or impersonal motives which appeal and commend themselves to all rational wills. Thus internal freedom of the will is not freedom of indifference nor freedom from all motives nor the capacity to do contraries but, truly interpreted, it means freedom from the inferior and external cravings of the physical body and the buoyant capacity to act, not without motive, but freely and voluntarily according to its true rational nature for rational and universal ends. Such moral freedom in its perfection is indeed nowhere to be found in experience but when conceived as an ideal, it is the supreme moral good and necessarily by itself clothes the individual with supreme dignity, as well as constitutes and creates his supreme right to this freedom which is at once absolute and inviolable. This supreme and absolute freedom, good, and the right, are indeed true and valid only as ideals but it is only from and upon the ideal of human freedom that the true and the only possible theory of right can be derived ; for individual freedom and legal right in actual social life are but progressive realisations in nature of the ideal and perfect free-will which is absolute and universal.

Fouillee reconciles freedom of will and determinism by the explanation that freedom in the sense of self-dependence, *i.e.*, one's being guided by his

It is not indetermination and is hence not

**inconsistent with the determinism of science.**

idea (ideal) of self, *i.e.*, of one's own ideal free nature is not indetermination. This idea of freedom and right, like other ideas, exerts an inherent attractive force and tends towards its realisation in objective life by the very fact of its being conceived and contemplated. They are "directive ideas" or force-ideas, intellectual motor agencies and effective centres of attraction. With the ideal of freedom and right in one's thought, the individual will feel drawn to rise superior to the prompting of self-interest and passion and act rationally and disinterestedly for the universal good. This idealism and rationalism, truly interpreted, is not opposed to determinism; for, in proposing in its theory of freedom and right to substitute the ideal of self instead of external and material force and interest as the real and proper determinant cause of our progressively good volitions and actions, it admits that they are not uncaused but are as determined as ever by pre-existing causes and motives, only that the cause or motive is the idea of self and not material interest or power. Evolution or progress is the gradual realisation of an ideal in the world of experience and realities; and freedom and right in this world are evolutionary entities, being partial and progressive realisations of the ideal which determined the evolution by its directive force (exercised on the minds of individuals and nations that conceive and contemplate it). The ideal of freedom (which connotes, as explained before, disinterestedness and universality) communicates the halo of its moral worth and dignity on the conceiving mind or

**The value of ideal freedom and inviolable right as 'force-ideas.'**

individual and to that extent constitutes him a free, *i.e.*, self-determined agent with a right (to freedom); and this freedom and right evolve as the ideal is more and more successfully conceived,[1] cherished, trusted and realised.

This conception of 'force-ideas' how distinguished from those of the Rationalists and of Kant.

In elaborating this theory of "Force-Idea of Right" Fouillee does not agree with the Rationalists who stand for the natural freedom and right of the individual on the uncritical and unsound assumption that it is a present inviolable fact realised in nature; nor with Kant who while seeing and admitting, with greater criticism, its non-realisation in this world of experience, nevertheless asserts it as a transcendent truth or postulate of practical reason and founds thereon his cardinal and universal maxim of legal right and freedom. With a desire to proceed more scientifically and gain the assent of the scientific world, Fouillee does not call for acceptance of the ideal of freedom and right as a self-realised transcendent truth or fact but is satisfied if only we would not class it with a chimera or illusion which is untrue both within as well as outside our realm of experience. With reference to the metaphysical or ideal human personality and its freedom he only takes up an attitude of nescience or agnosticism and remarks:—"Undoubtedly naturalism cannot positively prove that there is nothing in man beyond pure phenomena and their successions according to the uniformities of nature, for that is an assertion concerning objects outside the bounds of positive ex-

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[1] *Cf.* the Aristotelian theory of Form and Matter.

perience; but neither can spiritualism prove that this something beyond exists."[1] Fouillee takes his stand on the undoubted fact of the ideas, *e.g.*, of human personality, freewill, right, perfection, almost universally present in all civilised men and nations and on their proved influence in the direction of promoting progress and evolution towards realisation of those ideas in human nature and society. This is quite in consonance with the attitude of the psychological school which led science to accept psychic facts and forces as proper subjects for investigation inspite of their manifold incongruities with material facts and forces.

As force ideas, they are facts and centres of force demonstrable by science.

Fouillee looks to the future and bases his theory of law and rights on expectations of future freedom and perfection to be realised by the force-idea of freedom, than on the present or past data of our individual and social life, which in this world of pre-determined causes and effects can hardly yield any intelligible as well as scientific theory of juristic right. The rationalistic or spiritualistic theories are either scientifically false, or useless on account of their transcendentalism; the naturalistic (positivistic) and historical schools must yield to fatalism and determinism which points to the uselessness of all efforts including efforts at the creation and improvement of laws and rights or the advancement of freedom. Siding with the Psychological school in their view of the supremacy of the mind over matter and efficacy of effort he invites that school to rise

Fouillee substitutes a scientific idealism for the tran-

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[1] Legal Phil., Vol. VII, p. 167.

one step higher towards his own form of idealism whereby he clothes the Platonic 'idea' of human personality or the transcendental 'Ego' of Kant with the scientifically accessible garb of *thought* actually conceived in the mind, reduces the 'idea' to an actually cherished and contemplated ideal, and holds it out as a centre of force demonstrably found, by observation and experiment, to attract and guide human volitions and acts towards its self-realisation in the objective world. This is not transcendental but scientific idealism offered as the link, hitherto missing, between science and metaphysics, naturalism and idealism—the two hitherto irreconcilable modes and branches of thought and knowledge—so far as they relate to law and right. One's right refers to something which he can do or have in future without opposition. This right increases step by step, with one's dignity or moral worth, *i.e.*, in so far as he realises in himself his ideal of freedom from external and limited personal motives and his true free or universal nature that wills in a representative capacity for the good of all and agreeably to all similarly free and rational wills. A true theory of right and freedom would thus look to the future, that is, to the future realisation of the ideal; and a true analysis of the nature of right would disclose it to be one which is not circumscribed or closed but as an open and infinitely expanding verity which is permissive of more and more privileges and liberties as the person or individual realises more and more fully his ideal of freedom. One can understand Fouillee if only he is taken to mark the descent

scendental idealism of Plato and Kant—as the missing link between science and metaphysics.

Law (right) and freedom are ideals whose progressive realisation in the domain of science is *in the future* and not in the present.

of "the idea" from the transcendentalism (*cf.* Plato and Kant) of philosophy or Metaphysics into the psychological idealism of science and compare and contrast him with the Psychological school the exponents of which lead science and, in particular, the science of law upwards from the material world of determinism, its forces and interests, into the domain of Psychology and mind where psychic force is free to dominate and where law and rights can be made, or at least improved, by psychic effort to guide and control the blind evolutionary forces of the material world. Fouillee and Jellinek, in fact, come out from opposite quarters and shake hands to mark the truce of their respective parties; and the realm where they meet is psychic, which is the true realm of law and right; for they are in reality ethical and intellectual verities both derived from, and applied to, the human mind or will and its volitions.

Fouillee and the Psychological school.

Justice.

Justice is the congenial atmosphere established in society by law which by allowing partial but progressive freedom to the individuals externally corresponds to and helps, or co-operates with, what their ideal of freedom and right prompts from within, namely, their evolution towards the perfection (that is, the self-realisation) of the ideal. The theory of law, right and justice founded on this "force idea" of right is superior to the positivistic sociological theories founded on force or interest inasmuch as the latter, by dogmatically asserting the world of facts to be wholly determined by resultant and predominating mechanical or external forces or interests alone, take only a partial view of things

Superiority of Fouillee's theory to the positivistic sociological theories.

and leave out of account the irreducible psychic fact (the real nature or origin of which may be unknowable and unknown) that there are ideals of freedom, right, moral good and justice universally entertained by all thoughtful men and that those ideals are also psychic factors and forces which have at least as much if not greater determining influence as the material forces and interests in the evolution of man and society.

Fouillee's agnosticism regarding transcendental reality.

Thus, we find Fouillee rejecting the Kantian theory of right and freedom which seeks to find a practical maxim of law, for all ages and societies from what his philosophy adopted as a transcendent reality. He (Fouillee) accepts it however in a modified form: namely, that freedom and right are ideals of the reality of which in the transcendent world we cannot be positive either way; but these ideals are immanent in human thought and consciousness and constitute the most integral and characteristic element of humanity and confer upon it its peculiar worth and that they are not mere idle chimeras but have a scientific value as facts which possess a propelling force higher and stronger than the external material forces and interests in moving individuals and societies towards perfect morality, right and freedom. Turning to the naturalistic theories he rejects their dogmatic assertion that right is only a product of the conflict of social forces and interests, of evolutionary changes brought about by environmental influences. He admits however that the legal rights of individuals must be partial and changing or evolutionary,

because of the imperfect and continually changing material interests and forces composing, and operating in, human societies. Thus by elimination of the errors of both and synthesis of their truths he finds right to spring from the ideal of freedom immanent in human consciousness and to be realised in practical life in so far as the existing material and evolutionary forces and interests operating in society on the one hand and the psychic force developed (in proportion to the clearness and enthusiasm with which the ideal is entertained) in thought by the bulk of the members for the time being on the other, meeting in conflict or co-operation, or partly in conflict and partly in co-operation, permit its realisation.[1]

**Fouillee and Stammler.**

The net result so reached by Fouillee may well stand by the side of Stammler's doctrine[2] as a phase of Neo-Katianism and it is interesting as well as instructive to compare their respective methods of reasoning and lines of thought. Fouillee's bold and comprehensive attempt to secure a compromise and synthesis of the leading theories which had

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[1] The theory of interest and force combined in modern sociological theories (Jhering)—the former prominent in utilitarianism (English) and the latter in (German) socialism since the time of Marx—is in particular subsumed or synthesised by Fouillee with his own theory of right by the suggestion that the freedom of the individual develops in him the highest propelling force and constitutes also his highest interest; so that a social and legal system which most promotes individual freedom for all necessarily secures the greatest fund of force as well as the maximum interest for the whole body as well as for the individuals. See criticism of Fouillee by Spencer, Vol. VII, Legal Philosophy Series, introduction; Tarde, Vol. V, Socal Modern Criminal Science Series 13.

[2] *Vide* Lect. VII,

for ages been like logical contraries to each other has raised a fresh crop of literature on the subject. Naturally these divide themselves into two groups. Ernest Scilliere[1] and Brunetiere[2] may be respectively taken as types representative of favourable and adverse comments and criticisms. The jurists of the Psychological School (Tarde,[3] Korkunov[4]) do not accept Fouillee's mediation between idealism and positivism as valid. They do not see how Fouillee's division of the developing social constitution into three stages or degrees of solidarity, namely, first, predetermined and automatic (when society has not yet developed the ideal of freedom and is governed by biological evolution), next consensual (when the ideal has begun to be recognised and felt), and lastly free (when the ideal has realised itself through the individuals coming to will and desire universally as freemen) can be correct or how an automatic act can be transformed into a free one.[5] The objections however seem to me to be technical and do not affect the substance of the truth that the psychological or ideal element begins to prevail over the organic element in society as it develops its psychic powers. We have had, besides, in the last lecture

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[1] See his final essay in "Introduction a'la philosophie de l' Imperatismer" (pub., Paris, 1911), 307ff.

[2] Sui les chemius de la Croyana (Paris, 1907), 9.

[3] Penal Philosophy, Vol. V, Modern Criminal Law Series, p. 13.

[4] See Theory of Law, pp. 308.

[5] See Brunetiere—L'Idea de solidarite in "Discourses de Combat," 2nd series (Paris, 1903), 67-8; Korkunov (Theory of Law, pp. 267) regards Fouillee's 'contractual organism' as a description of the society in the second stage to be an evident logical contradiction.

Korkunov's theory as to the freedom of will[1] which represents the Psychological view of the mental forces as factors promoting evolution like the material forces; but he cannot hold the human will to be free so as to be outside the law of causality. The ideal of freedom, he says,[2] is a false ideal, a hallucination; and volitions and actions under the influence of that ideal are not 'free' but as much '*caused*' as those under other material or external motives. This however ignores the characteristic feature regarding this ideal of freedom, namely, that it is, as Fouillee points out, a self-acting immanent element in the human mind, a part of his very inner constitution which cannot be attributed to any external material cause. The volition may be, and is, in fact, caused by the ideal; but the ideal itself, like human consciousness itself, cannot be attributed to any pre-existing particular or local environmental forces or causes like the other motives or interests which lead men to action. It is a cause not an effect. A more correct estimate of Fouillee's position seems to have been made by Arthur. W. Spencer who remarks:[3]

Fouillee how estimated in recent times.

"This purpose of harmonising realism and idealism was a lofty one but it was conceived perhaps a little too soon, when the psychological and gnosiological technic now beginning to be available was undeveloped. It is hard to see how any real monism can be achieved without carrying the psycho-physical parallelism to its remotest applications and one does

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1 See Theory of Law, pp. 303 *et seq.*, sec. 39.

2 See Theory of Law, pp. 308-9.

3 See Book VII, Leg. Ph. Series, pp. xxxix (Introduction).

not discover recognition of this parallelism in Fouillee." This is true and in fact, Fouillee never arrogated to himself the task of reaching a monism by any exhaustive research into the parallelism of the psychic and material world; and it is also true that as long as such monism is not established by one of the two parallel planes of existence being demonstrably reduced and merged into the other the question of free-will and determinism and with it the conflict of theories regarding the true nature of right will hardly be settled for ever. What Fouillee did attempt was to induce the idealists and positivists to see eye to eye with each other and combine if possible into a friendly dualism with a suitable ideo-physical theory of rights till the final metaphysics of human personality becomes open and available to science.

# APPENDIX TO LECTURE IX.

Charmont.

Charmont, another recent French jurist of repute, regards[1] the Sociological theories of Jurisprudence as amalgams of the older Historical and Utilitarian theories inasmuch as they take Law as an evolutionary institution (Historical view) changing with social progress and meant for satisfying social interests (Utilitarian view). The theories differ in detail but one common characteristic is that they all seek to base ethics on a scientific foundation and to integrate social science with the general system of the natural sciences by applying the hypothesis of evolution towards the explanation not only of the phenomena of objective nature but of social phenomena as well. Like biological evolution proceeding on the principle of natural selection, languages, religion, and other human institutions including law have been scientifically demonstrated to develop as products of 'selection.' The progressive changes for instance, in the forms of marriage,[2] in criminal law,[3] in modes of ownership,[4] mark the progressive adaptations of the societies in their own interest to terminate or prevent conflicts, to protect themselves against inside and outside disturbances and to bring vital rivalries down to an indispensable

His estimate of modern Sociological Jurisprudence.

It makes the science of biological evolution to explain social, legal and ethical phenomena

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[1] See his "La Renaissance der Droit Natural, translated in Vol. VII, Legal Philosophy Series.

[2] See Holland's Jurisprudence, Ch. XI.

[3] See do., Ch. XVI.

[4] Maine's Ancient Law, Ch. VIII

minimum. The net result of this sociological position therefore is to give pre-eminence to the interests of the society and subordinate those of the individual except in as far as the latter coincide with or are conducive to the former. Even when some of the sociologists advocate, like Spencer, the natural rights of the individual, *e.g.*, to free liberty of action commensurate with equal liberty of others in society, it is not based, as by Kant, on a rational *a priori* principle, on social utility, but, because by thus helping the production of strong freely developed individualities, the society would be benefited and better equipped to take its part in the modern struggles of the nations for supremacy and power. This idolising of the interests of the society and sacrifice of the incapable, the idle, the imprudent or the weak, who must be eliminated by the capable and the strong,[1] is the modern sociological ethics, supposed to be the decree of a large far-seeing benevolence. There is thus no longer law nor ethics based on any *apriori* ideal principle but only facts,[2] experiences and social utility and social resources (in the shape of law and morals) to secure social interests by compelling individuals to subserve those interests. The spirit of legality yields place to that of expediency. Charmont points out that this state of affairs takes away the respect of the citizen for law; it ceases to have for him any moral value and he seeks to avoid it as much as is necessary and possible for his

and their development.

Besides it idolises the interests of the society.

It bases ethics not on any ideal principle but on social utility.

Here legality yields place to expediency.

[1] See Spencer, Social Ethics, edn. of 1851, pp. 323, edn. of 1892, pp. 150.

[2] Danten, Nature des choses, pp. 154.

Necessity of sentiment and idealism in legal theory for commanding the respect of individuals for law.

self-interest. Some amount of Idealism, faith and sentiment, even if it wants the support of incontrovertible reason or scientific demonstration, has its value at least for evoking the respect for law without which it cannot support itself without despotism and violence. The individual's liberty of action and conscience must be allowed to bear a moral and legal value for itself; and the irresistible belief of man in its value must be taken to be the guarantee of its value without demanding any other proof acceptable to science. Some theories of law must accordingly be found out to supplement the older sociological theories of evolution and interests, as would ally the individual to the society and enlist voluntary subscription of the individual to the social legislations.

The renascent idealism of the French legal and social philosophy of the 20th century as above sketched is thus appreciative of the inadequacy of objective or positive science to solve the problems concerned with human volitions. Science deals only with what is or happens in nature. Human action is meant to improve upon nature, which is always mixed good and evil;—to yoke the natural forces to better account, to serve some human ideal or good (*i.e.*, what should be). So science is opposed to action, as reality is opposed to the ideal. The latter exists as the test and critic of the former, and bent upon its reform. So we must have some machinery higher than the sciences to supply us the test of what is desirable, good and perfect, so that guided by the ideal, we may suppress, eliminate or minimise

The modern position and attitude of France in legal philosophy.

the evils of nature or convert them into good and help nature to evolve towards the ideal. But this idealism in France, as a recent renaissance of her national sentiment, is yet under the spell of positivism which held the country fast since Comte's time and has not been strong enough to rise to the height of formulating any philosophical theory of law and justice as has been attempted in Germany.[1] It relies either on the intuitive sense of justice or moral sense of man (to distinguish good and evil including the evils and goods of natural solidarity) or on the still cruder 'pragmatic' test which is another form of experimentally inclined intuition. The need for idealism being now granted, French positivistic idealism intuitively inclines to return to the old time-honoured national ideals of progressive Liberty, Security, Equality, Fraternity, etc.,—without laying down any high philosophical foundation for them. They are asserted to be universal ideas and without their lead or assistance science cannot guide morality, politics or legislation. This is the ordinary French attitude, a sentimental and humanitarian (and not metaphysical) idealism colouring its positivistic sociology. But it is felt, even in France, that this sort of idealism is faulty as it fails to satisfy the reason; and unwilling minds, specially if they are scientifically trained, cannot be forced to accept its tests, ideals or logic.

Demogue.

Demogue's writings are very lucid and clear on this point. Examining the notion of law from the

[1] See Lec. VII.

Law from the objective point of view.

objective point of view, he finds it to be a social system of affording continuous protection of rights, enforced if need be, by coercion.[1] Here the moral idea is wanting, and the legality or illegality of acts is judged by the attitude (of promoting or preventing them) that is likely to be taken up by the organised forces of a society with regard to them. This attitude, however, is liable to change; and acts at one time legal may afterwards become illegal and *vice-versa*. Slavery for instance, which was in the earlier days a legal institution has now become illegal. This element of uncertainty as also the subservience of the law to a non-moral and arbitrary attitude or tendency (*i.e.*, of the organised forces in society) which has no certain test to guide or regulate it, explain why men have almost always looked up to a higher ideal law—the law higher than the laws. This (higher) law often regarded as akin to morals (and supposed to include that important part of morals which is felt to be so indispensable for the social weal as to call for its enforcement by the organised social forces) is, according to Demogue, really not dependent on morals but on different factors such as economic and other social considerations which are as well subject to changes and, while changing, carry the ideal law and morals along with them. Respect for individual property (for instance) is legal as well as moral so long as economic considerations favour that institution. It would be

It is non-moral, uncertain and variable—as dependent on the attitude of the organised forces of the society.

The higher Ideal Law, supposed to be akin to morals is also in fact dependent on social and economic conditions.

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[1] "Fundamental Notions," § 201—translated in Vol. VII, Legal Phil. Series, p. 355.

otherwise if collectivism comes to be economically favoured and politically ordained by positive law; for public opinion would imitate (by the laws of imitation)[1] and be moulded by the organised views and actions of the ruling section, especially if they (*i.e.*, the latter) are supposed or expected to foster economic and social interests.[2] The desirability, nevertheless, of having an ideal, *i.e.*, moral law, if it could be discovered, is undeniable; for it would promote legislative reform, purify the administrative service and inspire judicial law-making in advance of the positive law. It would besides educate and mould public opinion and morals and inspire public respect and confidence in positive law; and, in fact, public law would hardly be enforceable in society without such respect or confidence. The real difficulty however is—how to establish this ideal law?[3]

Value of the Ideal Moral Law.

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[1] Proved by Tarde.

[2] "Fundamental Notions," Vol. VII, Legal Phil. Series, p. 367.

[3] Demogue here examines the rationalistic and idealistic theories and rejects the older *a priori* and absolute systems of Law of Nature (before Kant) on the chief ground of their inapplicability to different peoples with different civilisations and environments. The criticisms of the Historical School, he says, have been decisive of them. He also finds fault with the more modernised, evolutionary, and hence less rigid, but yet idealistic theories such as those based on 'justice,' 'liberty,' 'solidarism,' 'the right of the individual' (Bendant), 'the inviolability of human perconality' (Boistel), etc., on account of the difficulty of "tracing the limits of their empire,—of seeing just how far they can go in the face of opposing principles or facts. . . . for where are the guarantees against the terrible thing—the abuse of a good principle (*ibid*, p. 371)?" As regards the theory of historic evolution, or rather the theories (*e.g.*, one purporting to be based on history and experience, of the German Historical school and the other—of Hegel—dialectically constructed out of the pantheistic idea of the absolute seeking self-realisation through history), Demogue admits that

Demogue thus voices the recrudescent national passion for idealism and insists upon the necessity of having an ideal law which is higher than positive law for the purposes of legal theory. It is no use condemning such ideal law with the current objection that the co-existence of two different and conflicting systems of law, one ideal and the other positive, is an absurdity.[1] Law forms, as pointed out by Jhering, only by conflict; and the ideal law is not necessarily a myth if it is not actually observed.

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they two are at bottom similar in their idealism, *i.e.*, in so far as law is supposed to be the manifestation of the popular spirit; but this idealism becomes useless and unfruitful as soon as it leaves no other clue to the nature of the 'popular spirit' and its timely demands or objects in particular stages and conditions of society except facts and experience, *i.e.*, *what is naturally to be found in social life.* This, Demogue says, is, or amounts to, giving away the ideal to the real or actual—"the annihilation of theory in the face of facts, a veritable renunciation"; "and this condemns it (*ibid*, p. 373)." Coming to Stammler's Neo-Kantian theory of "Natural Law with a variable content" as presented by Saleilles, he examines its ideal of 'justice' and points out that it is not absolute justice, but an "estimate which under the historical circumstances of a given period, taking into account the prevailing social conditions, one should form, for oneself, of justice"; that is to say, an ideal drawn from the current conception of it, as may be gathered, for instance, from the public spirit of the country and comparative law. Demogue accordingly dismisses it as insufficient,—as inefficient in presenting an ideal which rises superior to the momentary popular impulses and changing facts and experiences—on almost the same grounds that discounted the historical theory. An ideal of justice admitted to be relative is (according to Demogue) scarcely good as an ideal; for it gives itself away to the local and temporal shifting objective tendencies and laws instead of, as expected from it, rising superior to them and controlling and guiding them for their betterment.

[1] See Korkunov, General Theory of Law, § 17, where he criticises the dual system on this ground, *viz.*, that positive law, if in conformity with the Law of Nature will be identical with it; and if not, it would not be worthy of respect.

Necessity of the ideal law.

His plea for the ideal law may be best set forth in his own words :—" Despite the Historical School, despite the importance of the Sociological School, which in its wake, has believed that it could limit everything to the study of the laws of evolution, we think that an ideal is necessary because there is in human activity a quality of the conscious, and the willed, which must be directed. To deny this is to put physical laws in the same rank with the principles of human action and to reduce the law to a descriptive study ; it is, furthermore, to refuse to guide the legislator. The result is a serious confusion against which there is now-a-days an inclination to protest."[1]

This ideal is and must be an absolute and ever *present* ideal.

The ideal in law as well as in ethics championed by Demogue is a present or absolute ideal (a Law of Nature) although the social ideals (of different times and places) formed after it must, in taking account of the existing and past economic, psychological, temperamental and geophysical conditions, fall short of this ideal and differ from each other. The legal systems (positive) of each country must try to realise their appropriate social ideals while the common ideal must be universal in order to be completely free from the contingent element and must have one definite end in view which is the permanent goal of humanity. It must be concerned with the ever enigmatical problems like what is life for, and what is its goal. Demogue is thus not satisfied with the shifting ideals of the Neo-Kantians in law

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[1] Fundamental Notions," Vol. VII, Leg. Ph. Series, p. 875.

nor with those of Levy-Bruhl in ethics. He argues the necessity of a still higher ideal to stand as the model of all contingent ideals though he admits that he has no satisfactory constructive theory of his own to offer with regard to this (certainly necessary) ideal.

Three stages or phases of the nascent idealism in our day.

Thus we have three stages in this nascent idealism of our days. It has come to recognise, firstly, that legal theory cannot be based on the positive sciences alone; it must have some ideal higher than objective nature; secondly, that this ideal must be contingent, varying with the times and circumstances; and thirdly, that above these ideals there must be one permanent objective ideal which, having in view the final and absolute goal of human progress and activity, would stand as the model for these immediate ideals which constitute its varying adaptations under the contingent circumstances of social life.[1]

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[1] The names of Roguin [" Le Regla de Droit "], Picard [" Le Droitpur "] and Boistel [" Philosophie du Droit "] may be mentioned in connection with this modern search for an ideal in France in recent times. They attempt at a more approximate (though sociological) reconstruction of the ancient Law of Nature than Stammler or Saleilles. They seek for certain common and stable features in human sentiments and aspirations in all societies and certain common rules, methods and moulds which law must everywhere adopt in deference to those sentiments and aspirations. They all try [Roguin and Picard rely on ' security ' and Boistel on " the inviolability of human personality " as the basis of the ideal law. The former two also seek to attain the ideal through the improvement of the legal technic. See Vol. VII, Leg. Ph. Series, p. 280 (Demogue)] somewhat like the older schools of Law of Nature, to find some simple unitary principle or ideal governing all social ends and aspirations and at the same time take account of the ever recurring opposition and diversity of

interests, claims and ideas in the world of realities. But it is exactly this that (according to Demogue and others who think like him) condemn their attempts to failure. The stable and permanent equilibrium of society under one final idea synthesising minor oppositions is not to be hoped for anywhere in this evolving universe of nature. The conflict of law is never-ending; it will always represent and embody a series of small and temporary compromises. But the search after the final ideal (synthesising all these diverse and conflicting elements) will nevertheless continue for ever; for without such an ideal (however imperfectly or tentatively conceived) there will be no available means for guiding the evolution. Demogue, in conclusion, only hopes for small or medium-sized constructions of legal theories supplying temporary solutions (of these conflicts of interests) which may respond to the tastes and eccentricities of a given period and society; out of which other complications and conflicts are to crop up again requiring fresh theories, adjustments and compromises. He supposes that there is greater scope for legal technic (*i.e.*, the improvements of the methods of interpretation, administration and legislation, etc.) to improve and assist in the finding of these solutions than for legal theory to find out newer and more comprehensive ideals after the efforts of so many philosophers and jurists since the time of Grotius and Descartes. In the field of practical administration of law we may however (he points out) achieve considerable success by seeking to improve the art of producing good laws and good decisions in spite of vagueness of the theories of ideal law and justice. As an instance of practical success achieved by the improvement of the technic in art in spite of the paucity of ideal, Demogue cites the science and art of aesthetics and remarks :—" After all, has any one ever defined beauty? Nevertheless there are beautiful works which have been regarded as such for centuries." [Fundamental Notions, Vol. VII, Leg. Ph. Series, p. 572.] He admits however that the thirst for infinity in the soul of man is insatiable. Hope eternal will ever remain kindled in humanity and so the search for the ideal law will continue for ever.

# LECTURE X.

## Renaissance of Idealism in recent Juristic Theories—II.

### *In Italy and Scotland.*

Idealism in Italy.

This renaissance of Idealism (after a spell of enthusiasm for positivistic theories and explanations of social and legal phenomena) was not confined to France alone.[1] In fact, Italy[2] had seldom been thoroughly carried away by the wave of positivism and had ever tenaciously retained a substratum or residuum of her philosophical (metaphysical or idealistic) attitude in approaching and theorising on socio-legal questions.[3]

Del Vecchio.

Prof. Del Vecchio now stands out as a prominent figure in the department of philosophy of Law

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[1] The forms of modern idealism in Germany have been examined in Lec. VII.

[2] No doubt positivism also had its exponents in Italy, for instance, in Robert Adrigo, the "Patriarch of Padua," and his disciples; and there was besides Adrigo's positivistic journal "Revista di Filosofica and Scienzi affairs" to ventilate the logic and ethics of naturalism. Prof. Vanni's name may also be mentioned in this connection.

[3] This is clear when we examine the other different and representative schools of thought besides scientific positivism in Italy—*e.g.*, Pragmatism or "the Philosophy of action" (see Lec. VIII) represented by Papini, editor of 'Leonardo' as also by its official organ and mouthpiece "La Voce," and Neo-Hegelianism with its spokesmen like Bernadetto, Croce and others and its organ 'Critica.' The purely scientific or positivistic ideas came in the long run to be disfavoured; and the soil of Italy was in fact more congenial to metaphysical enquiries into the heart, unity or reality (*cf.* Vico, Lec. III) of things than to the mere scientific generalisation of their contingent phases.

in Italy. In his chief work "The Formal Basis of Law"[1] (consisting of three essays composed at three different times) he, at the very outset, assents to the view, expressed by Gierke, Bergbohm, Kant, Reid and others, that the definition of Law (although we have all of us some sort of intuition as to its nature) is yet in the making and that many of the definitions hitherto attempted have not only been unsuccessful but served to increase its difficulties.[2] The attempt at its exact definition, even if it is futile, is however useful in building up a theory of law and for exhibiting its essential elements and possible misapplications neither of which can be achieved by mere popular idea or intuition. History teaches us how many different and opposing theories had been started about the nature of Law.

Definition of Law—futile.

There is, in consequence of this, from the remotest times, the subjective or sceptic theory that law or justice, divergent and often contradictory in different countries, is a contingent product of the tastes and sentiments of a people at a particular period and has no constant essential factor by which it may be defined.[3] In spite of this however, human mind has ever aspired by constructive labour to dispel these sceptic doubts, overcome the contradictions of the empirical world and arrive at a

The consequent scepticism in legal philosophy.

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[1] Translated into English in Vol. X, Leg. Philosophy series.

[2] Formal Basis of Law, Vol. X, Leg. Ph. series, pp. 2 to 4.

[3] Vecchio gives a long list; from the Sophists headed by Pyrrho, the 2nd and 3rd Academics (*cf.* Carneades) down to the French Sceptics, *e.g.*, Montaigne, Pascal, and also (English) Locke and, still later, the Sociologists like Post and Philosophers like Bain and Spencer.

*Per contra*, the fundamental human craving for a philosophy of Law based on the reality of things.

unitary and rational simple and synthetic principle underlying law and justice in all its manifold forms. The conception of "Absolute justice," *i.e.*, justice or law founded on the very reality of things and not on human exigence and caprice, is one of the fundamental needs of human mind and the idea of "Natural Law and Justice" has its origin and foundation in this fundamental necessity and deep-seated reason. Its nature and source as also its relation to positive law may have been diversely conceived and formulated from time to time; but the divergency lies notably much more in the methods and arguments than in the conclusions.[1] The difficulty (felt by philosophy and science) in solving the problem regarding the ideal law and justice and satisfying a need which is grounded in human nature and consciousness does not by itself justify our ignoring the problem or its necessity and denying the ideal. The naturalistic or positivistic jurists and social philosophers (as also their predecessors of the Historical School) have sought to prove that the laws actually obtaining in societies as positive laws are man-made and variable and that the absolute and eternal (natural) law and justice nowhere exists; that is to say, as the positive law of the land. They also point out the errors and omissions of the older naturalistic and metaphysical philosophies of "Law of Nature" and this has given currency to the view that the "Law of

The conclusion of positivism about Law of Nature.

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[1] Vecchio cites Kant and Spencer as regards their practical agreement regarding Natural Law and its fundamental principle drawn from Liberty.

Nature" has been thoroughly refuted and that such a thing does not exist at all. Del Vecchio however (following Petrone and others) points out that the existence of Law of Nature or Natural justice is deontological or normative; it lies in the depths of human consciousness or conscience as an ideal and not as an externally realised fact like positive law. "It exists in as much as it is a force and it has force even when it is broken.[1] The violation is phenomenal and does not destroy law which is above phenomena."[2] Law (natural law) exists as a system of the highest truths or ideals not *sensible* (phenomenal) but *rational* (in human consciousness and reason) and is therefore not disproved even if it apparently disagrees with the current legal principles and institutions of human societies and even if the latter do not disclose any common or universal factor.[3]

But Law of Nature is deontological, has a rational or ideal and not phenomenal existence.

Del Vecchio next makes the most important declaration that indicates his exact position among the exponents of Law of Nature. He distinguishes the *concept* from the *ideal* of Law (Justice) and fixes their relation to each other. The definition (concept) of law aims *at the common elements of all laws*; but Natural (Ideal) law is only *the ideal system of law*. The ideal is only partially and imperfectly shadowed in the real. The sensible

How Vecchio distinguishes between the concept and the ideal of Law.

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[1] *Cf.* Fouillee's doctrine of "Force Ideas" Lec. IX.

[2] Formal Basis of Law, Vol. X, Leg. Ph. series, p. 18.

[3] *Cf.* in Mathematics the rational character of the Geometrical line which disagrees with the actual sensible lines which never disclose any common character of breadthlessness. So also in Ethics and Law.

realities of law contain baser elements which are eliminated from the ideal; and the ideal law, though logically universal and absolute, holds itself apart, alone and isolated in its own higher plane. So the attempts at the definition of Law are different in their object and character from (and should not accordingly be mixed up with) those which seek to find out the Law of Nature.[1] Just as the aspiration for the delineation of the true, the good, the just and the ideal in law (as in everything else), which is fundamental in our nature, never ceases although (or rather, because) it is never fully realised, and our attempts at closer characterisation of the Law of Nature accordingly continue for ever, so also our natural aspiration for the highest scientific generalisation, which seeks for the inherent unity in the infinite diversity of laws in the actual field of experience, never ceases, and ever reappears eager for a higher synthesis, to struggle with and overcome the contradictions of the legal systems, which crop up forever, and on which the nihilists in Jurisprudence and philosophy of law support their negation of the possibility of a definition of law and, therefore, of the Science of Jurisprudence itself. The two are distinct—but they are allied to each other and arise from the same source, *viz.*, the fundamental aspiration of our nature—the search for the true, the just or the ideal, and that for the highest scientific generalisation; *i.e.*, for the finding out of the common or universal element in the world of

The point of contact of the concept and the ideal.

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[1] Formal Basis of Law, pp. 19-20

phenomena. Here we need only limit our observation to law although the proposition is true for everything. The concept of Law as it is found in societies, as soon as, by repeated revisions and amendments, it reaches its true universality becomes the real material prototype of the noumenal or ideal law—the law which is absolute, perfect, true, real and just and here is the point of contact between the two.[1]

Beginning with the Greek Sceptics of the olden times, there have been series of relativists down to the sociological jurists of the present day who, impressed by the variability of Law and its dependence on social and biological conditions, deny its existence as a unit fact or objective essence and hence also the possibility of its logical definition. But inspite of this current opinion echoed by Post's celebrated dictum that "a constant idea of law is nonsense"[2] —an opinion referable more to the anti-idealistic bias bequeathed to the modern schools by Comte than to the facts gathered by modern social studies and researches on which it is supposed to be founded— these studies and researches themselves disclose a uniform substratum, the 'common mind of the nations' (*cf.* Vico), evidenced by deep-rooted similitudes and identities of principles and institutions among various peoples in different ages. The

The substratum behind the relativity of legal phenomena.

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[1] This point (that of the point of contact between the concept of law and ideal law) is only touched and dimly appreciated by Del Vecchio but he does not elaborate it. He throughout emphasises the concept, not so much the ideal, of law; and here he is distinguished from the other exponents of the Law of Nature.

[2] Bausteine, 1 Bd., p. 60.

**Failure of the Historical School and the positivists.**

Historical School and the positivists end in a solution of the problem of legal theory which is really a negation of the possibility of any solution; but the philosophy of law begins where the scientists end and seeks to gather out of and underneath the variability and relativity the common substratum which gives meaning to comparative study and furnishes the material for the highest object of legal science, *viz.*, the co-ordination of the manifold legal facts in a system so that they can be considered as phases of a universal and substantially homogeneous historical movement.[1] The ethnological comparative method of recent times marks an advance over the older historical method in gathering together the facts and making a point of their similarity in a common substratum. It exhibits a tendency among all peoples to co-ordinate their laws and institutions. It is now generally admitted by the different schools that in the attempt to escape from their primitive isolation and improve their conditions of life they contract new and more active and complex reciprocal relations including international exchange of ideas and commodities; and this together with the intrinsic development of human knowledge which is always tending towards the universal, leads to the formation and progressive development of international law and also to the assimilation, co-ordination, and cosmopolitisation of the different national principles of law and justice towards the attainment of a cosmopolitan law and "absolute

**The ethnological school marks an advance towards the finding of a cosmopolitan law and absolute ethics in the common goal of all legal advancement.**

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[1] Formal Basis of Law, p. 61

ethics ''[1] (Spencer). It shows that the '' uniformity of the laws of various peoples is not . . . . merely static but . . . . dynamic and progressive as well. The idea of the just tends to fix its content, assuming always a meaning more purely and universally human. Here too historical reality endeavours to harmonise with reason. Facts approach little by little what is revealed in the consciousness as an immediate need.''[2]

Wherein reality endeavours to harmonise with the cravings of reason.

The absolute Natural Law thus reverts to claim its own from the positivists; but it is to be derived not from the contents of the various laws or from their similarities; for these similarities are matched by dissimilarities also, and both must be taken into account for the absolute and universal theory of law. The theory is to be rather derived from the universal direction of progress of human laws and institutions or the universal goal, which, as well through similarities as through dissimilarities (both being taken as partial manifestations of the goal), the different national systems are striving to attain and which cannot therefore be displaced by the fact of relativity of law so much paraded by the opponents of Natural Law.

Law of Nature is to be derived not from similarities nor from dissimilarities of legal phenomena but from the universal goal that law seeks in all societies to attain through them.

The abstract unity of law is thus established by our intuitive recognition of the jural character of laws however differently they may be shaped, and

The unity of Law is represented by the 'Concept'—the logical ''form'' that underlies the varied contents of law as

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[1] For an account of recent positivists who admit the presence of social facts and tendencies which go to support the doctrine of universality of law differently stated by Kant, Schelling and Hegel and their followers, see Vecchio, Formal Basis of Law, pp. 64-65.

[2] Formal Basis of Law, p. 65.

the condition precedent of all.

by the fact that our very idea of the variety and evolution of legal systems implies an assumption of an abstract unity of 'form' underlying the varied and shifting contents of law. It is not in the *ideal of law* entertained at different times and in different societies at a particular age, that the unity can be found, but in the universal logical 'form' of the law which is a condition precedent to the possibility of the contents, whatever they be, of the law, at any place or time. This true process for finding the logical unity or the conceptualisation of law is the same as that which is the very life of all true science, *viz.*, the dialectic process by which we rise from sensible particulars to the intellectual universal. Socrates applied this process to ethics and became the founder of the ethical science. Plato made it the basis of all scientific objective knowledge and besides posited the objective existence, corresponding to each universal subjective concept, of a transcendental reality or 'idea' of which the sensible particulars of our material world were only defective images. Aristotle regarded these concepts as symbolic—not of transcendental realities but of immanent essences of sensible things. Thus it is from Aristotle that we get the doctrine that "the formal concept shows the immanent unity of multitude of things, while the material or content constitutes its plurality."[1] In the Middle ages the ranks were divided between (Platonic) transcendental realism and (Aristotelian) immanent realism

It is found by the Socratic process of logic (conceptualisation) by which we rise to the universal concept covering all sensible particulars.

Plato posited behind the subjective concept a corresponding transcendental reality (idea).

Aristotle takes the concept as a symbol of the immanent essence or unity of a variety of particular things.

Three views of the concept in the middle

[1] Formal Basis of Law, p. 71.

of 'forms' or concepts.[1] But there arose also the dissenters or nominalists (*e.g.*, Roscellinus, and later, Occam, and others) who held that concepts had no actual existence, transcendental or immanent, but that particular sensible objects were the only realities. In course of time another doctrine (conceptualism)[2] came to prevail which held an intermediate position between nominalism and realism and attributed to the concepts a psychological existence, *i.e.*, as *a posteriori* mental reflections or images derived by the synthesis of the sensible data. All these prepared the way for the modern revolution in philosophical thought.

ages; as corresponding to (*a*) transcendental reality—like Plato, (*b*) immanent reality—like Aristotle and (*c*) no reality at all (nominalism). The Fourth view—conceptualism.

From Descartes onwards, the whole process of philosophic reasoning was reversed. Instead of the acceptance or assumption, as by the ancients, of an objective (either transcendent or immanent) reality of the universe almost as an article of faith and, next after it, of the concepts as the natural *via mediâ* of our knowledge of the 'ideas' or universals, modern philosophy, fixing the human mind as the centre of speculation, started, first, with the 'innate ideas' as the means of our certain knowledge and proceeded, next, to found on these innate ideas its conclusions as to objective realities. Ontology was thus changed into (psychogenetic research or Epistemology) theory of knowledge in the modern age.

Modern philosophy starts with 'innate ideas' as the means of our knowledge and converts Ontology into Epistemology. But modern science disproves the claim of

The doctrine of innate ideas has however received its most serious blow from modern experi-

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[1] *E.g.* Platonists—Anselm, William and Bernardo; Aristotelians—Albertus magnus, Thomas Aquinus and Duns Scotus.

[2] Founded by Abelard.

innate ideas as self-existing essences.

mental science which has established their nature, at least partially, as *growths* or products of external influence and disproved their character as self-existing essences; but the *a posteriori* and empirical theory of knowledge which the experimental science itself (of the positivists) offers as a substitute for the doctrine of innate ideas is also inadequate in as much as no *a posteriori* generalisation of shifting particulars can alone give rise to our ideas or concepts of 'reality' or 'essence' 'necessity and universality' which are the essential constituent elements of the highest unitary truths or objective realities which all sciences seek to find. We can ignore neither the essence, nor growth and change. Both the necessary and the contingent elements—the universal and the particulars—must be synthesised.

Conversely, experience (science) cannot reach the reality or universal essence of things.

Kant synthesised innate or *a priori* reason and experience by his Critical philosophy.

Kant made a new attempt at this synthesis between unity and variety in knowledge—between reason and experience. The *a priori* element in knowledge which supplies the unitary 'forms' of thought explains the possibility of our perception of the changing particulars (which constitute the 'contents' of thought) and logically subsumes the variety of the contents within and under the 'forms' of unity. The synthesis is not chronological but logical; for the *a priori* element comes first, not chronologically in point of time, but logically as condition of the *a posteriori* experiences, and it is secured or brought about by our thought or knowledge and not in the objective world. Vecchio points out that Kant thus attributes to our knowledge and consciousness (of things) that immanency

The immanent 'form' that builds up particular forms is not an

of 'form' which Aristotle directly attributed to objective things or the external world.[1] The 'form' of thought necessarily covers *all possible experiences* which can never go beyond its universal ambit. Each particular content of our thought contains the underlying form which is immanent in it as well as in all other particular contents that actually or *may possibly* flit through our minds in course of our experience and therefore transcends the particular. Vecchio thus reads Kant as laying down and establishing this directive principle and implicit premise of his theory of knowledge, *viz.*, "Every empirical datum has within itself the reason for its transcendentality and this consists in the logical 'form' of its conception"[1] and prefers to base upon it his theory of law as a unitary formal principle, instead of following the positivists, who, relying more on the negative side of Kant's teachings, eschew the transcendental altogether and limit themselves rigorously only to the actual experiences. The philosophy of positivism is sought to be supported by the authority of Kant who maintained that ultimate or noumenal realities are inaccessible to theoretical reason; but as Del Vecchio points out, Positivism misreads and misinterprets Kant. It (*i.e.*, positivism) substitutes *actual* experience for (Kant's) *possible* experience; that is, the accidental for the necessary, a fact for its law. The limit of actual experience is but experience itself; that of

objective reality as affirmed by Aristotle but a subjective reality—it is the 'form' of thought.

Kant's *theory of knowledge* as construed by Vecchio.

Positive philosophy takes only the negative aspect or teaching of Kant's 'Kritik' and fails to utilise the clue to reality supplied by

[1] Formal Basis of Law, p. 74.

the ' form ' which the ' Kritik ' offers.

possible experience is the regulative principle superimposed over experience. The purpose of Kant's "Kritik" is to determine the elements which, transcending experience, render it possible. Modern positivism recognises nothing in experience which is not given by experience and is therefore a pure and simple negation of the "Kritik."

The ' form ' or ' concept ' covers a whole class and includes all possible particulars inside it irrespective of every contingent element that creates variety in the particulars.

The antecedence of concept to experience (of particulars) is logical and not temporal.

The ' form ' or ' concept ' is to be distinguished from the ' cause ' or the ' idea.'

The mistake of Plato and

With acute logical insight Vecchio determines the character of this logical ' form ' or ' concept ' which serves to cover completely a whole class consisting of an indefinite number of things, actual and possible, and constitutes the logical test or condition of the whole class regardless of the merit or demerit, origin, growth or perfection of the particulars that might be included within the class. As a universal condition, it transcends in spite of its immanence, and is logically anterior to, each particular, though it might be subjectively detected or conceived chronologically later, that is after a comparison of many particulars. The antecedence of the concept is thus not temporal but logical. It is independent of all considerations of time and growth, of material causality, or the ultimate ideal of things. It is the Universal extra-temporal (*a priori*) condition of every possible object of its kind and is therefore logically prior to all such objects. Plato and Hegel (says Vecchio) wrongly invested the universal ' forms ' or ' ideas ' with dynamic or causal force *for the creation* of the particulars and they accordingly confused or mixed up the ' formal ' and the ' efficient ' causes of things. Plato further identified them with the

'final cause' which fixes the ideal and induces as well as gives the direction to the growth, and thus overlooked the distinction which Aristotle afterwards took care to point out between the different kinds of causes. The logical 'form' is descriptive, and not productive (efficient cause) nor valuative (teleological ideal or final cause) of things.[1] The essence of a thing pointed out by the logical concept or form is the necessary residuum or minimum (and not the maximum) of its attributes which is equally present in all things actual or possible—the lowest as well as the highest—of the class.

Hegel in not distinguishing (1) the logical condition (pointed out by the concept) or essence which is the formal cause, (2) the efficient cause and (3) the final cause of things.

The admission or proof of the mutability of Law, therefore, does not imply its logical indefinability but rather points to a common substratum to which the mutability may be referred, *i.e.*, which constitutes the logical 'form' or concept of law. Unless the specificness of juridical phenomena is recognised—and in fact positivists do recognise it—no science or philosophy of law would be possible. The logical 'form' of law being universal is more comprehensive than the sum of all concrete juridical propositions and still preserves its unity of signification. It embraces not only actual but *possible* propositions and cannot therefore be derived *ex posteriori* by inductive generalisation from observed juridical phenomena; for, the difference between actual and possible experiences is not one of quantity but of quality because the latter is determinable only by a principle of rational order (*i.e.*,

No science of Law possible unless the specificness of juridical phenomena is postulated or presupposed, *i.e.* (by the concept). Reason why the concept cannot be derived *a posteriori* by inductive generalisation.

The actual and the possible are distinguished in quality and not in quantity.

[1] See Ch. VIII, Formal Basis of Law.

The possible is comprised only by a rational (*a priori*) principle and not by multiplication of particulars.

founded on reason and not on experience) which expresses the *a priori* limits or conditions of experience, *i.e.*, its form or category. The Natural Law theories of the 17th and 18th centuries erred in not distinguishing the purely logical qualities or conditions (concept) of law which are common to all possible laws (good, bad or indifferent) and its ideal paradigm or principle which must necessarily be opposed to the existing historical or concrete legal institutions in which the ideal is only imperfectly realised. The need or object of the ideal law or justice is only deontological or ethical, *i.e.*, valuative whereas that of the concept is only logical or definitive and the two stand apart. The ideal cannot coincide with the reality and cannot accordingly fulfil the function of definition served by the logical concept.

The mistake of the Natural Law schools in confounding the concept and the ideal and in seeking to *define* law by describing the ideal law.

The Historical School of Law representing the empirical or positivistic reaction against rationalism rejected both the ideal of justice as well as the concept of law because of their metempirical elements, and not distinguishing function and essence, fondly hoped to find out and fix the essence of law simply by generalisation from its empirical historic contents or, in other words, by mere historic reconstruction of the formation or evolution of positive law. Their unitary principle of (Volksgeist) popular spirit was a mere makeshift—postulate or assumption—vague and indefinite, without any sound philosophic base or meaning. This defect was pointed out contemporaneously by Bluntschelli, B. Poli, Prisco, Krause and others and more recently by Schuppe,

The mistake of the

Historical School.

Stammler and others[1] and even Savigny himself had to admit that the function or mission of the Historical School was completed by its effectively fighting with the old dogmatism of the rationalists with regard to Law of Nature and that it (*i.e.*, the Historical School) had no excuse for further existence as a school.[2] Its destructive work being now done, it had in fact no constructive philosophy of law to offer; for its method was unequal to such task. But with the decline of philosophy in general, the empirical spirit of the Historical School (now shorn of its philosophic postulates and assumptions) was transformed into the new positivism of France and England and entered into a freer and bolder era of activity. The positive philosophy of law deliberately abandoned the problems of the intrinsic nature of law or of the "just in se" or the metaphysical needs of reason in respect to the "bonum et justum" in law. The science of law was divorced from the conscience of law, and positivistic Jurisprudence became incapable and reluctant to explain, much less to systematise, the inner (logical) nature as well as the ethical elements of law. It reduced itself to a simple spectator and recorder of legal facts and changes in a period of intense and progressive legislative and political reforms which legal science was legitimately expected to judge and control. It took real experience as the origin, test and limit of knowledge. It regards law as an objec-

The Historic method unequal to the task of constructive philosophy of law.

The positive philosophy of Law abandons 'just in se' or 'bonum et justum,' divorces the science of law from its conscience and reduces itself to a mere recorder of facts.

And so fails to guide legal reform.

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[1] For references see Formal Basis of Law, p. 93.

[2] System des Romischenrechts (Berlin, 1840), 1 Bd., preface, p. xiii *et seq.*

The positivistic concept of Law.

tive organic fact, and its empirical perception in particulars as the *prius* which by repetition and accumulation of details generates an image in the mind made up of the common factors of these particulars. This is, according to the positivists, the concept or idea of the genus 'law.' It is therefore a derivative or 'consecutivum' and has no objective existence or value independent of the particulars perceived. It is to be gradually corrected and improved (and the definition of law is to be completed and perfected) in the light of wider and deeper historical observation of facts and not by the re-examination of the concept itself. Del Vecchio does not indeed object to the extensive study of the historic and evolutionary facts or contents of law undertaken by the positivists, for he admits that it is impossible to discover these facts by pure speculation; but he vigorously assails the positivistic position that external observation or experience of facts would by itself supply the idea or concept of law, and points out that the assistance of some antecedent mental or logical 'form' is necessary even for the observation and collection of the facts themselves.

Its inadequacy.

As explained by Vecchio.

In their attempt to find out the nature of Law only from its concrete phenomena past and present (and rigorously shunning all *a priori elements* of reason) the positivists overlooked that the selection of phenomena regarded as juridical, for the purposes of comparison and generalisation (which forms the first step in their process of scientific investigation), itself involves the use of an innate idea, 'form' or category of reason by which alone the differentiation

of the phenomena which partake of a legal character from the other phenomena which are not juridical is rendered possible. The *a priori* concept of pure reason regarding Law lay implicit in consciousness from the beginning as the indispensable condition of all empirical research in the world of legal experience and it is necessarily made use of by the positivists all along in their search for legal facts while they profess to shun everything that is not derivable from experience alone. "An anterior notion of the object of the research is indispensable . . . . both for a comparative as well as a genetic study. Only by applying the concept of law can we know when reality begins to present its characteristics; only by means of the concept can we recognise the primary and rudimental qualities of juridical phenomenology and ascribe them mentally to their proper logical order . . . . This does not mean, however, that it can be found fully developed in reason from the start. As law is realised in history by degrees so its notion is developed in the subjective mind by a slow process of development . . . . At first it (the notion or concept) is confused with the perception of the accidental elements which form the contents of special cases. The Universality of the concept cannot be found except by degrees as it is abstracted and freed from the different particularities of the cases under consideration. . . . In this process historical studies can be of aid inasmuch as they are an *a-posteriori* proof of the applicability of the concept. Genetic studies are particularly fitted for such service for they show at what point certain facts of historical evolution acquired a juridical

The concept is the condition and not the result of induction.

Vecchio's description of the evolution of the concept in course of scientific and historic study of experiences.

sense or nature. The logical form of law is here subjected to a crucial test because the observer can see what the modifications are whose presence shows the character of law and whose absence entails its loss. But here too . . . . a genetic examination in fact offers us only an opportunity to go over reflectively the primal and immediate identification which necessarily precedes it. . . . There is but one means to attain and define logically the true universality of laws—to leave the contingency of content for the necessity of form, which is necessary because it constitutes the conceptibility of law and therefore is common to all possible cases of experience. Leibnitz teaches us that we must 'learn' our innate ideas. This means that little by little what has been virtually in our knowledge from the beginning discloses itself. What is the conclusion psychologically is the beginning ontologically and the subject can reach the object adequately only by these two extreme terms.''[1]

Del Vecchio's position summarised.

Thus Del Vecchio takes us back to the region of the universal concept realised in the variety of its historic manifestations in social life and attempts a resuscitation of reason from the vortex of rank empiricism into which the positivism of the early sociological jurisprudence had plunged it. His metaphysical idealism (or more accurately, his logical realism) is more intense than that of Stammler, Fouillee and the Neo-Hegelians and approaches the heights of Leibnitz and Kant (though

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[1] Formal Basis of Law, pp. 102-3.

not of Fichte).[1] He reminds us forcibly of the philosophic truth "that the world *as our representation* is only a *function of knowledge* which is essentially the organ of ideas, and this lofty point of view should not be lost sight of under an accumulation of empirical data no matter however large. The world always remains to be considered as a super-growth from knowledge and yet as such is subordinate to the ideal determinations in which it is exercised."[2] Many of you who may be untrained in the technic and modes of philosophic thought will probably find difficulty in following the learned author in what he says here; but the gist of it is that the world of reality is, to everyone of us, nothing but *what we know of it* and know to be yet unknown. This knowledge of the world as it grows does not add new things to our mind but represents a gradual unfolding of what was already there implicit and unmanifested like that of the tree from the seed. The innate *idea* unfolds itself as *knowledge* and knowledge represents the world of reality.

The limits of the science of Law which cannot supply the concept nor the philosophy of Law.

Del Vecchio however admits the necessity and value of the positive and historical science of law; but says it must not arrogate to itself the function of the philosophy of law nor reject the formal 'concept' as unreal or as nothing more than an *ex-posteriori* generalisation from the concrete contents of law collected by scientific and historic (comparative)

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[1] He goes beyond Aristotle even, but he does not apparently see eye to eye with Plato. That explains his differentiation of the 'concept' and the 'ideal' of Law.

[2] Formal Basis of Law, p. 99.

research.[1] We must begin with the philosophic or logical concept of law founded in reason as the *a priori* condition or 'form' which enables us to select our materials. But it must be supplemented by *a posteriori* or empirical collection of historico-juridical facts (selected with the help of the form); for any attempt to derive from the "form" itself, unaided by experience, the whole contents of the law will necessarily confine it "to an endless circle of inconsequences" like those of some of the older metaphysical schools.[2] The study of the formal concept becomes sterile only if it is divorced from that of the historic contents of law. The two studies must however be kept distinct from each other and it should be clearly understood that neither of them can singly serve the purposes of the other. The 'form' alone cannot create the contents by deduction, nor can the contents by themselves yield the 'form' by induction. Hegelianism was guilty, by its attempt at a dogmatic identification of thought

The two must supplement each other.

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[1] With reference to the English Analytical School and the cognate school of "Allgeimene Rechtslehre" (General Theory of Law) in Germany headed by Merkel (including Binding, Bierling, Thon and others—the exponents of the Theory of Norms) Del Vecchio values their services in systematizing positive law as it obtains in certain epochs and places and also in elucidating many of its leading principles in connection with the different branches of the subject; but with regard to the fundamental problem of the logical nature of Law he holds them guilty of the philosophic error of regarding as "the concept of Law" what is really "a generic formula or sign of a number of particular things." Their definition of Law comprises not all possible laws—not even all positive laws—but only some classes of them as have appeared in certain societies at particular epochs.

[2] Vecchio here pointedly refers to the Krausians.

and reality [1] (subject and object, being and becoming, essence and phenomena), of ascribing to the concept of law a casual or creative force and deducing from it the historical contents of law; and this led to the subsequent exaggerations of metaphysical jurisprudence [2] which provoked reactions in the shape of the exaggerations of empirical phenomenism of the positivists, *i.e.*, of the early sociological school. The historical and evolutionary realities of law cannot be guessed or laid out beforehand from the concept. Nor can the concept be derived from these realities. The *causes* of the realities are not in the concept but in the plurality and complexity of the "sufficient historical reason," *i.e.*, the efficient historical and environmental forces which the historical and sociological jurists have been so carefully investigating with profit.

Cause as distinguished from the concept.

There is the other branch of the study of law, distinguished and kept apart from the philosophy of the concept, *viz.*, that which aims at fixing the ideal of law. The ideals of 'proportion,' 'protection,' 'liberty,' 'well being,' etc., which have been affirmed in respect of law may legitimately be investigated and held up to explain the foundation of law, *i.e.*, the principle of its justification, or to judge of the merits and demerits of a particular juridical principle by the tests of its consistency or otherwise with the ideals; but they cannot properly

The ideal of Law is to be distinguished from its

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[1] Here contrast Vecchio and Kohler. *Vide* Lecture VII for the latter's support of the Hegelian principle of identity.

[2] *Cf.* the Krausians.

concept or definition

be transformed (as done by many legal philosophers) into so many definitions of law. Kant's formula of law based upon the ideal of liberty, for instance, is not a definition in the strict sense, but a rational principle which had the value of an ideal in Kant's mind. Teleological definitions, such as those of Kant and Jhering, based respectively on the ideals of liberty and social ends, or 'interests,' describe not law (as it is) but the ideal law or law as it should be. They involve the logical error of defining a genus by its highest species—which is 'a denial of the connotation of the whole genus.'[1] We must first of all know what law is[2] and if we take care not to confuse it with the other questions that crop up in its connexion, we may usefully supplement our knowledge of jurisprudence by historical and comparative enquiries into the material and other efficient causes of legal phenomena, and also by the teleological studies regarding its ideal forms, purposes and ends. These three sets of enquiries correspond to three distinct *a priori* needs of our nature and reason—logical, causal and teleological. They should supplement each other, and the contempt of the metaphysicians for empirical studies is equally to be deprecated as that of the positivists for the metaphysical and logical speculations as to the Law of Nature or the *a priori* concept of law.

and both from its material and other efficient causes.

With regard to the concept of law, Del Vecchio founds it on the innate or *a priori* process of reason

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[1] Formal Basis of Law, p. 122.
[2] This is the 'concept.'

How Vecchio determines the concept of Law.

by which we subjectively determine the quality of justice or unjustice, right or wrong in an act. Facts which do not depend on conscious volition are not amenable to such determinations and are not juridical ; but human thoughts, though not given effect to by physical action, are acts inasmuch as they have a manifested existence, a definite conscious content, and hence they cannot be eliminated from the field of law. Though more easily capable of concealment they are revealed and recognised in many ways and may be judged. Even external acts can remain hidden, but that does not affect their juridical quality. Thoughts were supposed to belong to the intellect as opposed to the will or volition ; but modern psychology has demolished the older theory of distinct faculties and established the unitary character of the human mind. Thoughts and volitions are therefore alike as psychic facts. It is true that laws do not generally punish thoughts ; and even that freedom of thought (*e.g.*, of religious belief) may be conceived as a right. This however only proves that thought is legally permissible or legal and not that it has no juridical character.[1] The ideas of right and wrong are two logical correlatives which go together in the formation of a juridical judgment and it is a mistake to suppose either of them to be posterior or subordinate to the other.[2]

Every conscious act or thought has a jural character because we can adjudge it as right or wrong.

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[1] *Per contra*, Analytical School, see Holland's Jurisprudence, Ch. II.

[2] Vecchio criticises Schopenhauer's view (*vide* Lec III) that 'wrong' is the antecedent of 'right.' See Formal Basis of Law p. 149.

A positive law in the shape of either custom or statute establishing juridical norms is an act of man and is therefore itself subject to a juridical criterion. We may adjudge it right or wrong, just or unjust. The distinctive mark of positive law as a juridical norm is that it is generally observed and obeyed. A body of such juridical norms, naturally concordant and cohering together, forms a system or unit and constitutes the positive law of a society. Many juridical maxims however may remain unincorporated into the system, but they are nevertheless juridical in their character as they disclose a criterion for discriminating between right and wrong. Positive law is thus a juridical principle actualised by common acceptance in a society. It is not juridical because it is actualised; but what is thus socialised or actualised is law because it is a juridical principle, *i.e.*, determines a criterion of right and justice. Hence law which is generic, including all principles determinative of right and justice, is not to be limited to positive law which represents a single moment (that of social acceptance or actualisation) in the life of law. The mental determinations of right and wrong in individual consciousnesses have an important bearing on the choice of juridical principles for the purpose of actualisation into Positive law; so they are not mere fancies which are irrelevant for the purposes of an enquiry into the genesis, or essence, or the materials of positive law but they in fact constitute the earlier forms of law before its positivisation. Positive law is thus preceded by juridic thought. Human mind has the faculty of determining rules of justice independently

Law (juridical norm) is not limited to Positive Law alone.

Positive Law is preceded by

of, and prior to, positive law; for otherwise no legal reform would be possible. Law, right or justice is not force; for even though men in the so-called state of nature (*i.e.*, before social organisation) would, as urged by Hobbes, Spinoza and Jhering, decide questions of right by the test of physical strength, yet it implies that even among them the two are logically differentiated; for might is not conceived as right but as the test or measure of right. Right or law is valuative and refers to the moral order of reason; it suggests rather the regulation or control of force than force itself, which is morally blind or indiscriminative. Similarly, law or the idea of justice is not the result of the play of social forces,[1] or of only economic forces,[2] or of the material relations of life. Force (physical or economic, social or individual) can never make every act appear as just. Law (*i.e.*, the juridic principle of right and justice) and morals are always in accord, coming from the same ethical principle or system; but the difference is in their application which, in the case of morals, is limited to the considerations of the act from the point of view of the agent himself, and in the case of law, from the point of view of others.

juridic thought.

Right (Law or justice) is not Might or Force.

Nor is it the result of objective (material, social or economic) relations and forces.

Law as distinguished from Morals.

A lawful act is what is *permissible* or *possible* in society, although it may not be a moral act binding on the agent as a *necessity* or duty. The test of the morality of an act is "Am I justly

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[1] *Cf.* Gumplowicz, see Lec. VI.
[2] As held by Marx, see Lec. VI.

or rightly called upon to do it?" That of legality is "Can any other person (*i.e.*, the society) rightly or justly prevent me from doing it, or am I (representing the society) rightly or justly called upon to prevent the act if done by others?" In the case of law the question is whether the act would be allowed or suffered or prevented; and in the case of morals it is whether the act should be done or omitted.[1] It may be a moral duty for me to omit or refrain from an act (which is permissible in law, *i.e.*, possible for me to do) but it may not be my moral duty to prevent it if done by others. An act may be ethically necessary for me; but it may not be impedible if done by others; for what is not ethical or moral "considered 'from the point of view' of ' my life and circumstances may possibly be ethical or moral of another in his different set of circumstances. Therefore what is ethically possible or permissible is legal and what is ethically necessary is moral. Everything which is ethically necessary (moral) must be ethically possible (legal); but every legal act is not necessarily a moral duty. The juridical consideration and valuation of an act regards its external side only, *i.e.*, harmonisation and co-ordination with others, and is not self-determinative like its moral valuation which tends to settle internal strife. Moral judgments are applica-

Their respective tests.

They are respectively meant for settling external and internal strife.

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[1] Whether one should, so far as his circumstances permit, be bountiful to others, is a question of morality. Whether one should be prevented from causing hurt to, or disregarding his contracts with, others is one of Law. In both it is the question of right and justice, but looked at from different points of view.

ble directly to motives and indirectly to acts but the juridical ones refer directly to acts resulting from motives and only indirectly (and through the acts) to the motives. Law is accordingly not unilateral like morals but bilateral, establishing, as it does, the correlation of several agents in connection with an act. Thus the *a priori* condition of the appearance and recognition of law is the communion, through mutual and respective acts, of a number of individuals. It is a logical determination different from, and independent of, the historical fixing of the time of Law's first concrete realisation in society. The latter enquiry is indeed very difficult; for some system, however rudimentary, of ethical thought is found in every stage of associated life, and history cannot trace any stage of human life except where it has already assumed a social character. Custom, themistes, and other ancient forms of law no doubt indicate a certain psychological adhesion of the citizens to the juridic principles involved in these forms, and they therefore usually predicate a will, and even a "general will," of the society that accepts these principles as valid and binding. But the appearance and support of the general or social will is not the essential part of Law itself. Psychological and natural conditions (geophysical, economic and others) lead no doubt to the common acceptance by a number of individual wills of the same juridic principles as valid, and their common acceptance by the dominant social will constitutes the positivisation of the law. Common acceptance of juridic principles and constant practice or uniformity of action according to those principles (custom) do not

The *a priori* logical condition of law's manifestation.

It is independent of historical ascertainment of its first concrete appearance and also of the general popular ac-

ceptance of any common juridical norm by the society.

create Law but only reveal the popular will. They only make the Law visible; they are not the source but only the indication or mark of Law.[1]

Law is imperative.

Vecchio admits that all juridical norms, whatever their form may be (explicative, negative or permissive), are really imperative; inasmuch as they express a need of the commission or omission of an act and tend to safeguard the possibility of an action by the exclusion of other possibilities incompatible with it.

Vecchio's conception of rights.

Juridical norms affect the natural practical capacity of man by prohibiting certain of his possible acts of commission and omission and thus delimiting the sphere of his legally possible (rightful) acts. This sphere or circle is not fixed or constant for any given agent but varies with the subjective and objective conditions as well as with the change of the norms themselves. In fixing the orbit of the right of the agent the norm also fixes the orbit of the rights of others with regard to their power of infringement of the former. Thus in limiting one's free acting the law protects the limited activity allowed by it, introducing a certain correspondence of rights (of the agent) and duties (of others). Law thus becomes synonymous with the juridical possibility of the repression of wrong; *i.e.*, of enforcing the observance of a right by others—an integral and characteristic part of the right itself. Thus law and coercion go together. It is true in

Law and coercion.

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[1] Formal Basis of Law, p. 170. Vecchio here quotes Savigny and Puchta's views in support of this proposition.

certain cases (*e.g.*, public rights) the coercion of law is not possible (*e.g.*, against the state) but this rather throws doubt on the legitimacy of regarding them as true legal rights, than on the principle of the essential coerciveness of law.[1]

Law of Nature.

Del Vecchio last of all turns to the philosophical question of Law of Nature. Philosophy seeks to find a Unitary principle for the co-ordination and systematisation of all particular and varied phenomena presented in experience. Human knowledge passes through three stages : the first comprises only particulars without any synthesis or ordering principle to connect them. The next is negative in character betraying a helplessness or despair after unsuccessful attempts at the discovery of some unifying or synthetic principle of the world and its evolution. This is the stage of Scepticism in knowledge. It becomes philosophical when the sought-for-principle has at last been discovered. One such principle governing all knowledge of things is that of causality which explains all manifestations in nature (conceived as a mechanism) as parts of an endless series of causes and effects. Modern science has achieved splendid results by sticking to the causal principle and searching for efficient causes of things, in preference to the Aristotelian speculations as to their first causes, or their final ends (*i.e.*, teleological purposes), in the physical sciences. In the sequence of facts, every fact is both an effect as well as a cause.

The three stages of knowledge.

The Causal principle of Nature.

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[1] *Cf.* Austin's views on this question, Lec. IV.

The concept of causality, involving as it does, an element of necessity, is *a priori* and not derived from mere observation of sequences in experience.[1]

Its limitations.

The philosophic limitations of the causal principle however are :—(1) that it applies only to phenomena and explains one phenomenon by another explaining neither the beginning nor the end of things. It cannot admit or explain the origin or first cause (which is only cause and not an effect) nor the final end or goal (which is only effect and is not a cause). Dealing only with the modes of being it pre-supposes or assumes an underlying substratum (substance) but cannot give any idea of its nature. Both its assumptions, *e.g.*, of matter which supports the changing modes, and of energy, which produces the changes, are beyond the reach of the principle of causality and hence they are really metaphysical entities beyond the proper sphere of science which treats only of phenomena. (2) It is not qualitative. It equalises all effects to their causes, consequents to the antecedents, and cannot help us in valuing them with reference to any standard of perfection. Spinoza in elaborating his philosophy applied exclusively this principle of causality even to psychological and social activities and metaphysical problems (herein going further than Bacon who admitted the applicability of the teleological concep-

It cannot explain matter (substance) nor 'energy' (force) but only assumes them.

Nor 'quality' or value.

It cannot offer any standard of perfection but only equalises causes and effects.

Spinoza's misapplication of this principle of causality.

Accounts for his

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[1] *Cf.* Vecchio's similar arguments regarding the concept of Law (or right and justice).

tion in Metaphysics) and arrived at the only possible logical conclusion that all existing things are perfect in their reality,—that even the affections and passions of man are not to be judged as vices but should be studied as properties consequentially following upon the universal and primeval necessity which governs nature in its movements.

only possible conclusion that everything is equally perfect.

The other philosophic principle which, without logically contradicting the causal and deterministic explanation of things suggested by the mechanical or strictly physical concept of nature, supplements its defects (as noted above) is the teleological or metaphysical conception of a spontaneous and inexhaustible living power or substance which is above causality and guides the world evolution through successive developments to new forms and higher goals. Like the causal principle this also is founded on a fundamental necessity of thought. Aristotle failed to harmonise the causal and the teleological concepts of nature and conceived the qualitative differences of objects as products of the struggle between the two principles of "form" and "matter" which is continually carried on in the world processes with varying degrees of success[1] as attend the efforts of man seeking to shape a stubborn material into desired forms. Prior to Kant, even the rationalists (like Descartes) shared in the distrust of Aristotelian (anthropomorphic) teleology and joined with the empiricists in sticking to the causal theory as the sole principle of nature. Kant

The co-ordinate metaphysical or teleological conception of Nature is also founded on a fundamental necessity of thought.

Confusion of the two principles before Kant.

[1] See Lecture I.

attempted a rational reconciliation of the two principles, the first, analytic, showing the relative necessity governing and determining the diverse phenomena and growths, and the other, synthetic,[1] which while it admits the quantitative and causal (mechanical) equivalence of antecedents and consequents —causes and effects—introduces a measure by which their relative qualitative perfection with reference to the final ends of the whole reality or substance may be discriminated. The causal principle looks backwards towards antecedents for the historic reason of things; the teleological to their future and higher developments for an explanation of their purpose or end in the scheme of developments. In one case the cause explains the effect; in the other, the effect explains the cause. The two principles are complementary; both are subjective; for even causality is not mere sequence but sequence connected by the *a priori* concept of necessity. The causal principle is one of homogeneity and identity or equality (of cause and effect); the teleological is one of heterogeneity arranged as a hierarchy. The

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[1] Anthropomorphic teleology is extrinsic (*i.e.*, not intrinsic, *i.e.*, not in the thing itself but in the man who is its shaping agent); the direction of movement or change is impressed from without and it is the result of conscious deliberation. The modern philosophy of teleology regards it as intrinsic, as is clearly noticed in organic entities in their growth. The insufficiency of the causal interpretation becomes thus more apparent as we rise in the scale of things from inorganic to organic and psychic entities wherein the internal finality (entelechia) is more and more clearly evidenced in the co-ordination and continuity of functions and forces for definite purposes or ends. The living character of the principle or substance underlying nature is felt and recognised especially in the processes of adaptation and reproduction.

Causality and Teleology discriminated.

'Nature' of a thing, teleologically interpreted, means that inherent animating principle which seeks its fullest and most perfect development (self-realisation) into its highest and noblest forms and specimens; and 'Nature' becomes "the principle that develops in the world through an ascending order of types—the reason which vivifies matter and compels it to organisation and individualisation, assuming properties and relations always more elevated until it at last becomes spirit, a subject that feels and wills and even thinks."[1] The limits of my space preclude my summarising the acute disquisitions by which Del Vecchio tries to familarise students of jurisprudence with the metaphysics of man as the conscious Ego—the highest production of teleologic nature. In short he supports the idealistic meta-physics of Bruno, Kant, Fichte and Lotze.[2] Man in his character as the conscious Ego holds a two-fold character. He is, objectively, a part of nature—a link in the causal chain as well as the acme of

The Metaphysics of the Ego.

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[1] Formal Basis of Law, p. 253. The metaphysical height of Del Vecchio's philosophy of Law of Nature may be gathered from the sentences immediately following those quoted in the text. "It is such a concept (*i.e.*, of nature teleologically conceived) more developed philosophically (*i.e.*, than the causal view of it) which places us in a direct and intimate relation with reality of which we are part. It is this concept which gives the reason for our infinite and mysterious love of nature, since it shows the deep identity of our being with the universal being." P. 255.

[2] Also of Schopenhauer, Croce, Simmel, Schelling, etc., who, behind and beneath minor superficial differences, all recognise this fundamental metaphysical primacy of the conscious subject and its freedom from the causalities which, while conditioning and governing the world of objects, are wholly conditioned by and subordinated to the Ego, the thinking or conscious 'substance,' in which all the causal objects inhere, *i.e.*, as objects manifestated to a subject.

Taken as a subject the Ego partakes in the essence of the absolute and universal Ego or consciousness, sustains the world as its logical prius and is independent of its causalities.

nature's teleological evolution. He also, subjectively, *i.e.*, taken as the subject, conceives nature in his thought or consciousness. Nature, *i.e.*, the external universe, as an entity in consciousness, is meaningless except in terms of consciousness and thought. Logically, Nature, as something felt, thought or remembered,—and it has no existence except as something which is felt, remembered or reasoned about—depends on the thinker or Ego or his consciousness for its reality and existence. If there had been no conscious Ego to sustain its reality by its thought there would be no nature. While objectively, *i.e.*, as an item in nature, man as the thinking individual is subject to the causal principle and determined by his antecedents and conditions of life, as the conscious Ego, he partakes of the essence of the universal Ego or consciousness which sustains each and every particle in the manifestation of nature in its totality as the logical prius and rises free and independent of its causalities and determinations. It is in this latter subjective aspect, where the Ego assumes an absolute character rising freely superior to the causal principles of the objective world, that his actions cease to appear as mere natural phenomena (which are causally determined and hence ethically colourless) and acquire an ethical meaning and value. Subjectively considered our actions are free volitions emanating from our free conscious will; but if we look upon them as movements of an object in nature (projecting ourselves from within outwards and looking upon ourselves as we see our reflected image in a mirror) they will inevitably appear as caused and predetermined by conditions

and lose all ethical character. "The only principle that gives a strict adequate view of the ethical world is that which recognises the absolute quality of the Ego, the logically existing supremacy of man over the objective world. The faculty of abstracting and precipitating oneself out of nature, or of referring all reality, which converges in the Ego to it by way of ideas, forms the proper and specific being of man —his nature in an eminent sense. This faculty or transcendental vocation is affirmed psychologically by the knowledge of freedom and imputability (conscience, which the Spirit cannot overcome or disregard) and is converted by man into the supreme norm. Act not as a means or vehicle of the forces of nature but as an autonomous being having the qualities of being and finality; not as driven and controlled by extrinsic motives but as dominant over them; not as a part of the sensible, but of the intelligible world; not as an empirical individual, as "homo phenomenon" governed by physical passions and impulses but as a rational Ego or "homo noumenon" independent of such influences; in a word act with a knowledge of the pure spontaneity of your being and therefore (for its meaning is nothing less) of your substantial identity with the essence of every other human being."[1]

It yields the only principle which adequately explains the ethical world and is psychologically affirmed by the inner sense of freedom and imputability.

It supplies the supreme norm.

From that supreme and absolute ethical imperative or norm of action, deduced from the absolute or suprasensible nature of the Ego in man, Vecchio derives its two forms of Ethical, *i.e.*, the Moral and

The two (legal and moral) imperatives derived from the supreme norm.

[1] Formal Basis of Law, p. 265

Legal, imperatives. The distinction between the two has already been explained and need not be repeated here. The moral imperative points to the self-regarding duty of the agent himself as a free suprasensible Ego to attain moral consciousness, *i.e.*, to conquer by his absolutely free determination all his own inferior motives and particular and sensible impulses and thus to give his acts the universal character of reason,[1] so that "he identifies his being with that of every other man—leaves all that which forms his empirical individuality—and takes his place "sub specie eterni" giving his conduct a typical value. Man should attain by himself the universal rule of activity so that all can act as he does.[2] The moral imperative thus "shows the agent how he should act, what he should do and what he should omit." The other form, *i.e.*, the legal imperative indicates the limits of the right or prerogative of the agent corresponding to his moral duty, *i.e.*, of legal *possibility* corresponding to the (moral) *necessity* of the ethical act, or its preventibility by others corresponding to its desirability from the point of view of the agent himself. Based on the same ethical principle, derived from the absolute nature of the Ego, it entitles a man "not to be forced against his will to enter into any relation with another—to be used by any one as a means or instrument."[2,3]

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[1] *Ibid*, p. 270. See Kant here, whom Del Vecchio faithfully interprets and follows.

[2] *Ibid*, p. 271.

[3] *Cf.* Stammler, Lec. VII.

The *a priori* universal law of personality.

Vecchio thus frames the universal law of personality. "Do not extend your caprice over others, do not aim to subject to yourself those who are subject to themselves alone:" It is the principle of law and justice derived from the metempirical absolute or universal nature of the conscious Ego, deduced *a priori* from reason, depending on no historical institutions or sanctions of any kind and extending beyond the limits of time and space. Historical and concretely realised rules of positive law, as the expressions and effects of the dominant social force may often fail to correspond with the 'Law of Nature' or absolute principle of justice; but the latter stands and operates in relation to them as the measure or type (the teleological ideal) of the rationality of their contents.

It is the teleological ideal (Law of Nature) and test of all concrete rules of justice.

The concept and the ideal further compared.

The teleological principle of Natural Law is a valuative principle which fixes the ideal of law whereas the concept of law fixes its *a priori* nature or logical criterion. Both of these are *a priori* or independent of experience of which the latter presupposes the *a priori* and innate faculty of consciousness or mind which proceeds to pronounce on the jural quality of acts while the former is based on illumined reason fixing the criterion or ideal from the mere (also *a priori*) consideration of man's true nature in relation to which the valuation must be made.

They come into contact with each other in their origin in the innate necessities of man's conscious nature, but are distinct. The concept indicates that a fact has a juridical character, *i.e.*, is capable of being adjudged right or wrong, just or unjust; the law of nature offers the ideal principle

by which its juridical valuation may be actually or correctly made. Slavery is a juridical institution for it comes under the concept of law. It can be adjudged right or wrong. (It is not merely a moral but a juridical institution, or it involves not only the question of its propriety, which has got to be considered from the point of view of its necessity, but of its possibility and preventability.) It is also a (causally) natural institution from the historical (*i.e.*, empirical or positivistic) point of view. But judged by the teleological principle of the Law of Nature it is not just or right, although it is juridical. An institution of positive law may thus be truly and really juridical in character, and also historically natural and right (because all such institutions must be caused and predetermined by sufficient historical reason), and yet inconsistent with the Law of Nature, affording good grounds for philosophic criticism and requiring reform. The complete examination of the Law in Jurisprudence requires its study from all the three standpoints of its logical definition or concept : its natural historical origin and causes, material contents, varieties and developments and their modes of change ; and also its *a priori* standard (Law of Nature) by which the realities of the positive law are to be valued with the object of reform. Those (*e.g.*, the historical and positivistic jurists) who ignore the ideal and its value, because it is not found realised in actual experience (*i.e.*, in positive law) and the others who (like the older schools of Law of Nature—the Hegelians or the Krausians) refuse to recognise a positive juridical fact or institution whose content does not accord

with the ideal as historically (*i.e.*, materially, or in fact, as positive law) valid and binding are equally in error—through their overlooking, in different ways, the three equally essential points of view and the true antithesis or distinction between the ideal (free, teleological or final) and the real (historical or causal). The former tie or limit themselves to the causal interpretation of nature and so the distinction between good and bad, right and wrong, just and unjust is gone. Everything that is, becomes just (because natural or causally predetermined by sufficient historical reason) and questions of legal criticism and reform become meaningless. The latter clash with the objective historical realities of life and come to their cost (as evidenced by the general suspicion of, or against, the metaphysical doctrine of Law of Nature) " to free the doctrine of law from all objective elaboration of fact which historical reality gives it."

The necessity of amalgamating the study of the ideal with that of the historic realities.

In fixing the above proper connotation of "Law of Nature" and freeing it from its ambiguities Del Vecchio critically examines the different meanings given to Nature. The schools which conceived of a primordial state of Nature in which man lived under the so-called Nature's law held and regarded "Nature" not as a universal (in time as well as in space) either sensible or transcendental principle or criterion of reason governing all experiences and judging them with reference to the absolute and free self-consciousness of the Ego (the inner nature of man) but as a state of pre-historic concrete experience; not " as a truth superior to phenomena but as a phenomena chronologically earlier,"

The mistake of the earlier schools in regarding Law of Nature or the Ideal law as Law of the primordial state of nature.

"Natural" here, in the sense of primordial, makes "Nature" the first state of man's empirical existence or the genesis of things. It is the first link in the chain of causality that governs all phenomena and cannot logically be distinguished from all subsequent states or changes which, causally following it, are equally natural; so that the distinction drawn by that school between the state of nature and the state of society or civil state is justly condemned by the Historical school. A cognate theory of nature distinguishes it from art, *i.e.*, from what is derived or acquired especially through the act of man. Here also the concept of nature reduces it to an empirical fact subject to causality and cannot logically be regarded as a valuative example. Religious dogmas (*e.g.*, those describing the fall of man) and classical tradition (*e.g.*, of the heroic or golden age) developed the tendency of identifying the earliest with the most perfect state of existence and thus history was made the foundation of ethical principles which are truly and logically based on prehistorical and *a priori* foundations. Weak philosophical reasoning, fumbling unsuccessfully for valid *a priori* bases of dimly appreciated principles of justice, sought to justify its conclusions by pseudo-historical speculations as to the ideal past. This "pseudo-historical ideology" seeking the ideal rational principles of justice and justifying them by speculative assertion of their concrete existence in the pre-historic past naturally gave rise to different and divergent conclusions as to the contents (characteristics of the ideal state) of the ideal Law of Nature. Each positive, social and legal system would have some opponents

This makes it (Law of Nature) the first link in the chain of causality and is disproved by the Historical school.

Favoured by religious dogma and classical tradition it identifies the earliest with the best and wrongly bases ethics on history instead of on *a priori* reason.

who would seek its reform on the lines of a conjectural ideal pointing to a different system which was supposed to be sanctioned or prevalent in the state of nature. The mistake of this identification of the primitive and the ideal,—the teleological goal and the first causal antecedent—and attaching a normative meaning to a genetic or historical principle, encouraging speculation, was injurious to history and also to philosophy by its tendency to foster a habit of superficial and indiscriminate handling of the two essentially different *a priori* concepts of reason. Thus the ideal law is derived from the most rudimentary and primitive nature of man, his earliest motives and impulses appearing from his birth and the functions and properties which he has in common with the lower animals and the inanimate objects. Human nature is thus reduced to the smallest number of original or parent motives, or one of them which seemed to be most original, such as Egoism or sociability ; and a whole scheme of Law of Nature is deduced from the so-called unitary and basic characteristic of nature (*i.e.*, human nature).

This was injurious to history and philosophy alike and was guilty of deriving the ideal Law and Ethics from the lowest and crudest manifestations of human motives.

Hobbes followed this procedure for finding the nature of man, *i.e.*, the unitary original sensible motive which prompts all human activity and which is the foundation of natural as well as civil society. It is not (he says) reason (as per Aristotle) nor the social nature (as per Grotius) which we do not find in children or savages but appears later in life and only in developed entities. These are not innate in man but derived as the result of culture. It is Egoism or the desire for sensible good (and its corol-

Illustrations : Hobbes

laries)[1] that marks the human nature from birth and is common to man and lower animals. It constitutes the earliest and most universal trait of human character because it is found even in the least developed man with the fewest relations and from his moment of birth. The ordinary criticism levelled against Hobbes' Egoistic doctrine—as to the origin of society—is that his psychological analysis is incomplete inasmuch as he failed to notice the undoubted existence of social or met-egoistic motives or impulses in primordial man and even in the lower animals.

The ordinary objection to Hobbes' theory.

Hobbes' attempt to derive moral sentiments (*e.g.*, piety and reverence) from egoism must however be given the credit of initiating the English psychogenetic researches into the origin and development of the former which discovered the modern psychology of "association."[2] Egoism and the egoistic impulses have now been further traced, along with those which we call social, altruistic and moral, as mutually complementary psychic functions and tendencies co-ordinating with, or arising out of, the organic or biophysiological ties and laws governing the necessary correlation, connection and interdependence of the individual and the species or society. The social tendencies of men, it has now been established, correspond to the very conditions of life. So they lie at the very root of all social existence and in fact create society. To regard them

Supported in the light of modern biological

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[1] The Egoistic impulses, *e.g.*, the instinct of self-preservation, the desire of possession, fear of death, etc.

[2] See Lec. VII.

as unnatural or as the subsequently acquired results of social life is "to give a creative virtue to history while ignoring some elements without which it could not even begin its course." [1]

and psychological sciences.

The more serious and fundamental objection to Hobbes' doctrine is that neither Egoism nor social sense, in fact no impulses and emotions which may be traced to be the causal or historical origin of society and its institutions, can account for or explain the juridical principle of the just or unjust in social life and the ideas of moral obligation or necessity that it carries along with it. "The juridical problem is not if but how men should live in society, that is according to what criteria of reciprocal obligation society should be formed." [2] Impulses and appetites establish the genesis and not the moral or juridical legitimacy of acts, institutions and laws for which we must consider man "in his intelligible (as opposed to sensible) quality of pure principle, *i.e.*, not as the supporter but as the author of his motives, capable therefore of subjecting all his impulses to measure and judgment and absolutely determining his own acts." Otherwise all ethical values and, with them, all moral and juridical obligation and responsibility will fail and the acts, institutions and laws will all appear as causally determined results of antecedent and sufficient historical reason like the phenomena of the inanimate world. Hobbes' replacing of Grotius' 'social impulse' by his own 'Egoism' as the origin and historical basis of so-

The more fundamental objection to Hobbes' theory.

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[1] Formal Basis of Law, pp. 304-5.

[2] *Ibid*, p. 307.

ciety, thus involves only the error of insufficient psychological analysis, but his founding of natural law or the ideal of justice on the Egoistic nature of man (which is the lower, *i.e.*, phenomenal concept of human nature, and subordinated to the law of causality, *i.e.*, biophysiological conditions and causes) is an undertaking which is logically impossible. He himself felt this and in fact explicitly denied that there was any distinction between the just and the unjust in the state of nature. This denial though logically correct (inasmuch as justice appears only with reference to dealings of man in society) is however wrong as used by Hobbes to support the proposition that our sense of justice is created *a posteriori* by the gradual refinement of our egoistic impulses through calculation of self-interest after social experiences and bespeaks his inadequate conception of human nature,—" his failure to perceive the *a priori* rational or intelligible principle over and above the sensible impulses in man." The '*Jus Naturale*' of the state of nature wherein individual force reigns supreme and not law and justice is, according to Hobbes, converted (along with the change of the state of Nature to the organisation of civil society) to *Lex Natura*; and Nature, *i.e.*, the Egoism or self-interest of man, itself impels the change, and induces man to subject himself to the discipline of organisation and law and part with his '*Jus Omnia*,' *i.e.*, the universal right of free use of power in exchange for the superior advantages of social life and legal protection. This, Vecchio acutely points out, is an illogical position. Expediency supports only timely self-sacrifice and obe-

If fails to perceive the rational principle above the sensible impulses in man.

The illogicality of deriving moral obligation and justice from expediency

dience and discipline so long as they serve higher and more abiding self-interest; but it cannot develop the sense of justice, moral necessity or obligation. The civil society and law, arisen out of the pre-historical anarchy of the state of nature, created through self-interest and supported by might,[1] will have to maintain itself only on the same support, *i.e.*, by self-interest and force, by despotism and absolutism, till ended by civil war or revolution. Justice identified with force means negation of justice as distinguished from force. It thus in a way admits that if there is any justice independent of self-interest backed by force and self-interest, it must be founded on some principle other than the sensible motives of man. Social compacts creating civil society are obligatory on Hobbes' principle only so long as 'nature' or 'self-interest' impels a man to observe them; and there is no necessity or obligation to obey the state and its law when self-interest is not served thereby.

Spinoza's doctrine also defective for the same reason.

Spinoza's doctrine is also defective for the same reason. "Nature" identified with physical necessity and power would authorise as just and proper, in the state of nature, whatever a man desires and has power to do. The social compact invented by Spinoza to account for the establishment of a new principle and order of things (for the sake of the advantage thereby accrued to the very individual subscribing to it) together with the necessary reservation of a natural right (which is admitted by Spinoza) to anyone to break the contract whenever

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[1] As held by Hobbes' philosophy.

it would serve his interests (and herein Spinoza differs from Hobbes) really converts the contract into a meaningless joke without any obligation at all. All the objections against Hobbes' doctrine are thus applicable to Spinoza's account of the social contract and the law of Nature.

Kant.

Kant had by his profound critical philosophy thrown unprecedented light on the deep-seated elements of human nature, mind and consciousness, and their comparative capacities for the knowledge of things. He clearly exhibited the powerlessness of the theoretical reason to reach and comprehend the reality of things underlying the sensible phenomena ; and this teaching was the foundation or starting point of the empirical or positivistic philosophy which shunned the reality of things as inaccessible and strictly limited science to the investigation of the phenomena of Nature, their history and causes and the laws of their development. But the positivists however failed to grasp the full significance or implication of Kant's teachings which in denying our sensible perceptions the privilege of insight into the noumena impliedly suggested that the deeper substratum of pure consciousness which was the *a priori* condition of all phenomena or empirical knowledge is itself not phenomenal in character but partakes of the nature of the absolute or noumena itself which was the absolute universal consciousness which created and supported all phenomenal nature. Kant himself did not particularly apply this critical theory of knowledge for the elaboration of the philosophy of law ; and a partial conception of his theory by others is responsible not only for the one-sided

Kant's view as to the powerlessness of theoretical reason to comprehend the noumenal reality was the foundation of positive philosophy, which lost sight of the real implication of Kant's teachings.

Both positivists and the post-Hegelian metaphysical jurists

philosophy of law of the positivists but also for the equally one-sided and opposite, *i.e.*, intensely rationalistic and *a priori* metaphysical theories of Law of Nature which shunned (after Kant, Fichte and Hegel) history and facts and lost touch with the concrete realities and necessities of social life and accordingly soon came to be regarded as merely idly speculative, academic and impractical. Del Vecchio undertakes to reconstruct the philosophy of law on the basis of what he considers to be the full and complete theory of knowledge left to us by Kant. He adopts as perfectly correct in its own sphere the positivistic position that all laws are 'natural,' that they arise inexorably out of historical (including geo-physical, economic, organic or biological and psychic) causes so that juridical phenomena come in place with the other phenomena of nature (which in their origin, development and final forms are all, alike in inanimate and animate kingdoms including man and society, governed by the laws of causality) and with the knowledge of those laws carefully gathered by the only correct, *i.e.*, the scientific method of experience and induction, can be successfully and usefully, along with and in relation to other social phenomena, subsumed under the universal societary science (sociology). At the same time he shrewdly points out that sociological jurisprudence, thus created and developed, would only describe what have been or are regarded as juridical facts, rules or institutions but it would not be able to indicate and explain the nature of juridicity or the test of justice, *i.e.*, neither the concept of law or justice which distinguishes juridical from other social facts nor the

produced one-sided philosophies of law due to a partial conception of Kant's theory.

Their synthesis as undertaken by Vecchio.

The limits of positive sociological jurisprudence.

It cannot explain the nature of juridicity nor the test of justice, *i.e.*, cannot yield

either the concept or the ideal of Law. It must be supplemented by the rational (*a priori*) method which, in its two departments, supplies the concept and the ideal.

true ideal or criterion by which the legality or justice of these facts, rules or institutions can be judged. He proposes therefore to supplement the sociological method which is scientific, causal or historical dealing only with the sensible or phenomenal conditions and antecedents, by the rational method of determining with reference to the deeper, *i.e.*, intellectual or rational, side of human nature and consciousness first, the *a priori* juridical concept which recognises facts which among other social facts may be classed as juridical no matter whether they are just or unjust, and next, the *a priori* maxim or principle of the ideal Law of Nature by which the justice or injustice of any particular juridical fact can be tested or measured. His characteristic contribution to the philosophy of law is the distinction drawn between the concept and the ideal of law and justice which, being both *a priori* in character, predetermined in reason and independent of experience, respectively represent the conditions (and therefore the beginning) and the end, or the first embryonic prompting and the final perfection and goal, of the ideas of law and justice which have been ever developing in concrete form in human consciousness in course of history and experience. He notices the confusion made by the earlier rationalists through identification of these two *a priori* concepts of juridicity and ideal justice—the first appearing earliest and the second latest in human cognition—and in effect ascribes to this confusion of thought the inveterate habit of the earlier schools of Law of Nature of crediting the perfect principles of justice (Law of Nature) with objective existence, *viz.*, as the earli-

Vecchio's characteristic contribution to the Philosophy of Law.

The concept and the ideal respectively represent two opposite logical poles of evolution.

The confusion of thought involved in the identification of the two by the earlier rationalists. This was due to

est concretely realised rules among men even before their civic organisation into society. Perhaps here, instead of decrying it as a confusion of thought and ascribing it to religions and classical traditions, Del Vecchio might have, with a little deeper philosophy, more successfully traced the rationality of this concept of the ideal past and the metaphysical validity of the identification of the *a priori* condition and the (also *a priori*) final goal of law in their common foundation in the universal reason which he clearly perceived to be the essence of the Ego. But it must be noted that the recent wave of idealism, *i.e.*, the "Return to Kant" finds Del Vecchio in the present day on its crest representing the highest idealism which sociological jurisprudence, in its broader sense, may logically attain without relinquishing its positivistic or scientific researches which have, it must be admitted, made in their own plane, *i.e.*, of historical causation, enormous additions to our fund of knowledge of the juridic phenomena and their modes of development. He philosophically establishes the rational autonomy of man above the causality of nature and thus fixes the ground of responsibility and imputability without which sociological jurisprudence cannot logically explain the ethical valuation of human acts; and, besides, supplies an ethical standard which based on the eternal verity—the autonomous and absolute universal reason—does never lose its value as it cannot be constantly and aimlessly shifted (like the sensible or phenomenal, and therefore logically untenable, standards, *i.e.*, of interest, force, utility, etc., offered by positivistic jurisprudence) by the development of knowledge

their habit of crediting the perfect principles of justice with objective instead of ideal or rational existence. Their conception of a concretely realised ideal past—the state of nature. Vecchio's services estimated.

How Vecchio co-ordinates and reconciles positivism and rationalism.

and experiences of men. Del Vecchio seeks to co-ordinate and reconcile the positivistic and the rationalistic positions by insisting on the dual aspect of 'Nature'—its phenomenal and metempirical sides; the former subject to causality and the second free and absolute. The affirmance of the one does not necessarily and logically lead to the negation of the other. He carefully and acutely keeps distinct the three categories of law, *viz.*, the logical condition or prius, which is the test of juridicity; the causal origin, which constitutes the sufficient historical reason; and the deontological or teleological ideal of legal facts and institutions; and points to the mistakes which jurists of both empirical and rationalistic camps have made by confounding them. The ideal of Natural Law had or has no real or phenomenal existence for it belongs to the ideal or metaphysical order; and the assertion of the older Natural Law schools that it is the law common to different peoples or that it was the law in the state of Nature is wrong.[1] But its non-existence as a realised phenomenon of social life does not justify the denial of its metaphysical or ideal existence in reason; for such denial would involve the negation of the only ethical test of morality, legality and justice of human acts. And lastly, the concept of law which is the *a priori* source of our idea of juridicity and also of responsibility or imputability of acts and is based on the same principle of autonomous reason in man which raises him as a free agent above all causality is a verity whose denial

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[1] This led the Historical and positivistic jurists to reject it.

will inevitably lead to the conclusion that all human acts and institutions are exactly like physical phenomena having no ethical value, and, therefore, all questions of legality, responsibility, reward or punishment regarding them are absurd and meaningless. To confuse the concept of law with the 'Law of Nature' or, in other words, to identify the principle or condition of juridicity with the ideal of justice would lead to the old rationalistic error of denying the juridicity of all positive laws which are not perfect; and its confusion or identification with the inductive generalisation of the common characteristics of positive laws (*i.e.*, the regarding of the *a priori* concept not only as speculative but unnecessary and redundant) indicates an uncritical and unsound theory of knowledge (*e.g.*, of the positivists) which fails to perceive that the selection of juridical facts which is the essential pre-requisite of their observation and comparison for the purpose of inductive generalisation would be impossible without reference to such an *a priori* concept of law. The old rationalistic dogmatism of the schools of Law of Nature and the empirical neo-dogmatism of the positivists are both erroneous and both need correction in the light of the philosophical criticism which distinguishes the categories and correctly estimates their respective functions. Del Vecchio's solution of the problem of Natural Law thus comes to this: The concept of 'Nature,' in its higher and broader sense, represents the inherent reason as well as the ideal teleological goal of all juridical manifestations and developments of history. The full concrete or objective attainment of the ideal was *not* made *in*

*the earliest age,—in fact it could never have taken place in the beginning*—but marks the end of the process " for it is part of all empirical development ...to gain only little by little its reason for existence which is virtually contained in its beginning. What appears first temporarily is generally the furthest from its nature teleologically considered while the adequate expression of its nature is given last in the series of experience as the fulfilment of its growth. This governs natural law as well as human nature from which it springs. The constitutional and characteristic properties of personality are shown only after development,[1] determined ' by the constant explication of the human mind over its own nature' (to quote Vico), and by the same stages ' the eternal seeds of justice hidden in the human race ' as it were keep developing from the childhood of the world in proven maxims of justice. We should look upon history in its organic character as the unfolding of an implied purpose. This tendency grasped by the mind *a priori* as an absolute and universal necessity superior and anterior to any application in experience develops in it through a long and laborious historical gestation....." Observance or non-observance *per se* of this ideal Natural Law as facts of the empirical order does not affect the intrinsic significance of the principle which is essentially transcendental and which is self-sufficient in its sphere regardless of its un-recognition or violation in fact, which must take place in

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[1] This is also true and perceivable in all organic or growing entities, *e.g.*, in vegetables and lower animals.

the midst of historical evolution. What we expect of history and what it actually shows us, though with much wavering and deviation, is that Natural Law is always making for recognition and will ultimately triumph."

In this synthesis Vecchio resiles from the extreme position of Orthodox or Platonic idealism.

Del Vecchio thus synthesises the idealism of the "Law of Nature" with the positivistic historicism of sociological jurisprudence and he does this by resiling one step from the extreme position of the Orthodox or Platonic idealism which pictured the final triumph of justice "as a return to the original state in which justice ruled uncorrupted" and in like manner interpreted the mental attainment of universal ideas "as a recollection of primitive knowledge." Instead of placing the Law of Nature twice over as the first as well as the last terms in the series of historical development he proposes to place the "Concept of Law" as the first term which stands to the ideal justice in the same relation as the embryonic seed does to the full-grown individual.

# APPENDIX TO LEC. X.

Lorimer.

In Scotland, however, Prof. Lorimer reverts, somewhat in the lines of Krause, Ahrens and Trendelenburg [1] to what Vecchio calls the extreme position of the metaphysical 'Law of Nature' schools. The object of his work 'The Institutes of Law,[2] as stated in the preface, is to place Politics, Legislation and Jurisprudence on a scientific basis, *i.e.*, on the basis of internal (subjective) and external (objective) facts of Nature instead of on dogmatic speculations. The permanent universal ethical truths and absolute elements in the religious and ethical systems (ancient and modern, oriental and occidental) of the world, which accord with the subjective and objective revelations of the scheme of the universe and become clearer and more definite as these revelations are more and more clearly perceived with the conscious evolution of each race, point to a code of life which is perfect and this code of life is called the Law of Nature. He opposes the empirical sociological method of judging actions by their results for before we can measure by results, the results must be measured. Utility tests actions by their capacity towards attaining some ends but the value of these ends must be measured by some teleological standard which "transcends individual tastes and sentiments." It

Proposes to support the extreme position of the metaphysical 'Law of Nature' schools on scientific basis of internal and external facts.

His criticism of utility as a measure of the

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[1] He exhibits the greatest sympathy for the views of Trendelburg.

[2] 2nd Edition, pub. Edinburgh, and London, 1888.

ethical quality of actions

is revealed to human reason by subjective and objective Nature (or the Cosmos) and is accordingly called the Cosmic Law or Law of Nature.

The theological assumptions involved in Lorimer's thesis.

The whole argument stands on the theological assumptions (*i*) that God is the *one* conscious personal cause of all existence and laws (Nature or Cosmos) and is omnipotent and perfect, (*ii*) that perfect Law of Nature is the divine Law or the Law of God made known to man either by direct revelation or by indirect revelation through the study of Nature which is God's creation. This latter includes (*a*) the internal evidence of our consciousness which proves man to be an autonomous being, a law unto himself and that the perfect rule of life is to be found in our own nature; and this is corroborated by (*b*) the external evidence of the universal history of the advanced religious and ethical systems of the world.

Law of Nature (Ideal Law) disclosed by direct and indirect revelation. (*a*) internal, *i.e.*, moral consciousness and (*b*) external, *i.e.*, universal history.

The rule of life is prescribed by *our whole nature* in our conscience which is not a separate faculty but our whole normal nature or moral consciousness manifesting itself ethically in appraising our actions and motives. This Nature-conscience or moral consciousness reveals rights and duties which are schemed out as follows :—as to subjective rights (1) Nature reveals no rights in relation to, *i.e.*, as against the Creator; (2) Nature reveals to us duties in relation to the Creator; (3) In our relation to the creation (*i.e.*, created objects), animate and inanimate Nature reveals the following rights :—(*a*) The fact of our being involves the right to be. (*b*) This right to be involves the right to continue to be. (*c*) Like the right to be, the right to continue to be has

Scheme of moral rights and duties revealed by the moral consciousness of man.

no validity against God. (*d*) The right to be and to continue to be implies a right to the conditions of existence. (*e*) The right to be implies a right to develop our being and to the conditions of its development. (*g*) The right to be involves the right to reproduce and multiply our being. (*h*) The right to reproduce and multiply our being involves a right of transmitting to our offspring the conditions of this existence which we confer. (*i*) The right to be involves the right to dispose of the fruits of being *inter vivos* and *mortis causa*. (*j*) All our subjective rights resolve themselves into the right to liberty. (*k*) In the limitations which Nature imposes on our subjective rights we have the first revelation of the principle of order. (*l*) Nature reveals to us the possibility and the consequences of the transgression of her laws. As to objective rights, (*m*) Nature reveals objective rights, *i.e.*, the rights of others which exactly correspond to our subjective rights. (*n*) Nature reveals objective duties or duties by *others* to us which exactly correspond to our subjective duties or duties by us to others. (5) The existence of subjective and objective rights and duties and of their mutual dependence constitutes the sole revelation which Nature makes to us with reference to human relations.

Ditto revealed by external nature.

Consciousness [1] directly reveals to us not laws or principles but powers and rights as above schemed out. With regard to our mode of knowing the Laws of Nature, Prof. Lorimer lays down the following conclusions :—(1 & 2) Natural Laws are

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[1] *I.e.*, Moral consciousness—consciousness of the nature of the man and its facts and elements.

rational and necessary inferences from the facts of Nature.[1] (3) They determine the ultimate objects[2] of positive laws and fix the principles of jurisprudence as a whole. (4) The Natural or *de facto* basis on which positive law rests being known the positive law which governs any human relation may be discovered. Lorimer[3] regards that to be the positive law which is the right application of the Law of Nature to concrete facts and circumstances of each particular case as opposed to the Law which corresponds to the Positive Law of the Analytical school. (5) Though necessarily existent and discoverable, positive laws never have been and probably never will be perfectly discovered. It follows therefore (*a*) that all human laws (Natural or Positive) are *declaratory* of our *rights* which are based on the *nature of man*; (*b*) Laws cannot change the character or alter the relations of persons; (*c*) they cannot constitute, extend, or circumscribe,

Human (man-made) Laws are imperfect adaptations of applications of the Law of Nature to concrete facts and circumstances. Hence the limitations of the human

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[1] Together with the powers and rights (and duties) directly revealed by them.

[2] *I.e.*, the maintenance of these powers and rights.

[3] Positive Law, is, according to Lorimer, Law of Nature as adapted to the circumstances of imperfect beings like men. Hence Positive Law which is imperfect and falls short of Law of Nature is nevertheless perfect *for us*, being perfectly suited or correspondent, in its own deficiencies, to our own deficiencies. But the perfect realisation of even this Positive Law in man-made laws is impossible because of the imperfections (1) of our knowledge of the Positive Law which has got to be realised in society, *e.g.*, by legislation, (2) of our knowledge of the conditions of its realisation, (3) of our power to realise it even as known to us and (4) our will to realise it as known and possible. Each subsequent reason adds a fresh source of imperfection which further increases the distance between the enacted law and Positive Law (*i.e.*, as defined by Lorimer).

laws *re* control of personal and proprietary relations of man.

a proprietary relation : so long as and to the full extent to which the facts on which rights of property formerly rested remain unchanged, these rights are inviolable but no longer and no further ; (*d*) Law cannot change the price of any commodity.

Lorimer's plea for the inviolability of enacted laws.

Law of Nature and Positive Law which is the concrete adaptation of the former to particular facts and circumstances being thus the sole tests of the validity of man-made laws, Prof. Lorimer avoids the only legitimate conclusion that one may deduce from his theory of Law, *viz.*, that the citizen is entitled to disobey and the judge to refuse to administer an enactment that may appear to them to be not in consonance with the Natural or Positive Law, by pointing out that the judge or the citizen is not entitled to exercise his private judgment against the presumption which stands at the root of the social organisation (civil society), *viz.*, that the sovereign is to be the interpreter of the Law of Nature in the society and that the interpretation put by him through the enactment is right. The judge, however, may exercise his private judgment and dispense 'equity ' in circumstances which were not contemplated and covered by the enactments.

The equity jurisdiction of the Judge.

Law and morals are correlative and indistinguishable.

Lorimer strongly criticises the rigid differentiation of law and morality or of perfect and imperfect obligations inaugurated by the Formal School (see Kant, Thomasius and Fichte : Lec. II) ; for rights and duties (derived from Nature) being throughout reciprocal and co-extensive, there is no distinction in principle, *i.e.*, in nature, between one class of obligations (moral or imperfect) " and another " (legal and perfect). He takes side with

what he calls the "Positive" (school) of Krause, Ahrens and Roder, who adopt the principle of guardianship and advocate the state's intervention by law with individual liberty for the sake of social welfare and morals, and opposes the view of the Negative school which (like the Formal school) limit the function or duty of law to "police" and commit it to the policy of non-intervention and the maximum liberty of the individual. The principles of justice or charity are identical; their separate realisation is impossible and their common realisation necessarily culminates in the same action. Lorimer's estimate of the relation of Jurisprudence and Ethics is thus formulated with reference to their respective objects:—(*a*) The ultimate object of Jurisprudence is the realisation of the *idea*, *i.e.*, the ideal, of humanity,—the attainment of human perfection; and this object is identical with the object of ethics when regarded exclusively as a human science; (*b*) the proximate object of Jurisprudence, the object which it seeks as a separate science, is liberty. But liberty being the perfect relation between human beings becomes a means towards the realisation of their perfection as humanity. Hence Jurisprudence in realising its special and proximate object becomes a means towards the realisation of the ultimate object which it has in common with ethics.[1] Lorimer also holds that "order and liberty like justice and charity are in principle identical. They can be reached only in conjunction

Lorimer supports the Hegelian policy of *Kulturstaat* as opposed to the Kantian *Rechtstaat*.

Identity or correspondence of Justice and Charity.

Ditto of Jurisprudence and Ethics,

and of order and liberty

[1] *Cf.* similar view expressed in Holland's Jurisprudence, Chap. VI.

and necessarily culminate together.[1] With regard to equality and fraternity also, if it is rightly understood in the sense of unity of genus or of species (which does not exclude family, and the still less individual, differences which undoubtedly exist as facts in nature), *i.e.*, in the sense that all men are *equally men* but are not *equal men*, liberty and equality will equally go along with law and order.''

Equality (and fraternity) rightly understood, goes like liberty, along with law and order.

The idea of liberty involves the idea of equality in one sense only, that which is popularly called '' equality before the law,'' *i.e.*, which demands impartiality towards the litigants that assures correct application of the Law; and further that each litigant is equally entitled to have his dues proportioned to his inequality.

The right meaning of equality.

Based on this same foundation of facts in nature on which his whole theory of law is logically built up, Prof. Lorimer holds '' Aggression is a natural right the extent of which is measured by the power which God has bestowed on the aggressor or permitted him to develop. Up to this point the right of conquest, individual, social, political and ethnical is involved in the idea of liberty and included in the object of Jurisprudence;'' and also '' An end that is just, justifies the means requisite for its attainment. The right of aggression consequently justifies the application of force and involves the right of war, when, and to the extent to which, force

Lorimer's view on the legitimacy and limits of aggression, war and conquest.

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[1] This again is subscribed by Prof. Jethro Brown the Neo-Austinian who devotes the first chapter of his '' Principles of Legislation '' to the historical and logical substantiation of the proposition that Law and Liberty go together.

or war is necessary for its vindication." These propositions, which at first sight appear to be astounding (and which are supported by reference to the logic of facts of nature, *i.e.*, the same logic by which Lorimer, following Spinoza,[1] bases rights on the capacities and powers of the individual), along with his evident desire to uphold the dignity of the authority of law and order in the face of the tenets of the French revolution, bring him close to the German School of Sociological Jurisprudence and the philosophy of Neitzche that more or less colours the thoughts and writings of most of its modern exponents from Stahl to Kohler.

His affinity with the German School of Sociological Jurisprudence.

The sociological character of Lorimer's legal theory is traceable in what he regards as the primary source of Positive Law. "It is," he says, "the real power of the whole community subject to the law as exhibited and measured by *its* rational will." This is identical with the autonomous social will and social force of the Neo-Austinians and of Sociological Jurisprudence in general. He distinguishes the Law *to* an individual or community from the Law *of* an individual or community. For an imbecile, infant, evil-willed or ignorant individual as well as for backward, savage, undisciplined communities there is only law imposed *on* or *to* them by superior external force or will. For, according to Lorimer, reason, power or capacity, good (*i.e.*, rational) will, knowledge, power and liberty

The sociological character of Lorimer's legal theory.

Distinction between the Law *to* and Law *of* an individual or community.

[1] See Lecture II on Spinoza on this point.

as well as equality go together, being identical in essence with each other as well as with autonomy, *i.e.*, being a law to one's own self. The community as a whole unit (like the individual) will be autonomous in proportion to its rationality and power co-existing together. Might is right as much as right is might. Rationality and power necessarily go together ; and where they do not, it is a pathological symptom which must eventually disappear in God's cosmos or Nature. It is the rebellion of a part of Nature against the whole cosmic order which somehow exists as evil or abnormality in the world just to make the general good, order, rationality and normality of Nature visible. Real positive law (as distinguished from man-created law) will exist in a community as *its* law, and not as law *imposed on it*, only in proportion to the extent to which power and reason coincide in it, and hence, to the extent to which that community is free ; so that all true legislation is, in the last analysis, self-legislation. It can spring only from the whole autonomous community which obeys it ; and the contributions which individual members of the community are in a condition to make to it will be proportioned to the existence and coincidence of power and reason, *i.e.*, the existence of real power in each of them. Legislation coming from the ignorant masses, *i.e.*, from blind or apparent power (without reason), as well as that from reason without power, *i.e.*, the enlightened and educated minorities who have not the power (the masses) to support them, will not be positive law but only enacted law, falling either below or rising beyond the real attitude of reason as well as of power

Correspondence of might and right, *i.e.*, of power and rational will.

Reflections on positive law and legislation in the light of the above principles.

of the community as a whole and the real positive law adapted to the nature and circumstances of the society. The principle of equality in the matter of citizenship should, as in the case of equality of man, therefore mean that all members of a society are *equally citizens* (voters) and not that they are all *equal citizens*.

How the social (rational) will is formed, ascertained, declared, applied and enforced.

The community *forms* its rational will through the educative influence of the four great institutions :—the church, the school, the press, and the polling booth. It *develops* its rational will by (*a*) conscious effort on the part of individuals and classes, (*b*) social organisation, (*c*) selection and setting apart of exceptional workmen for special work. It *ascertains* its rational will by electoral systems, plebiscites, etc., and *declares* that will by legislation or consuetude. The rational will of the community thus ascertained is *applied* to the special case either spontaneously or through jurisdiction (court of law) ; and *enforced* by its different organs of force, *e.g.*, the Army, the Police, and Court Officers. Lorimer throughout in these matters upholds the organismical and not merely an organic view of society. The community as an organism governs itself more and more effectively the more highly it is organised. It makes and develops its own organs for all the above purposes of legislation and administration of justice according to Positive Law. Much of his comments and advices regarding the above matters,—the best modes of forming, developing, ascertaining and enforcing the rational social will—is echoed in the sentiments and views ex-

The organismic view of society.

pressed by the latest developed sociological (psychological) schools including the Neo-Austinians.[1]

Lorimer's work estimated.

Lorimer's ' Institutes of Law ' is a useful reminder, as the last and representative specimen, or rendering, in the English language, and by an English-speaking jurist, of the rationalistic presentation of the Law of Nature which had been in vogue before Comte's positivism brought in the tide of reaction. Although that tide, as we have seen above, has now been stemmed and even a return towards philosophy and idealism is in the air, yet the world of thought is even now so full of the positivistic tendencies and modes of reasoning that Prof. Lorimer will, I fear, hardly gain a hearing; and any effort to support him or to detect practical utility in any of his abstract conclusions and arguments is likely to share the same fate. The returning idealism is perhaps ready to concede an ideal existence (such as Vecchio ascribed to it) to Law of Nature, however imperfectly that Law or principle may be detected in thought or realised in experience, but its real existence like the laws of physical nature, as asserted by Lorimer, is yet too large a pill for this science-ridden age. Idealism, like Plato's, which sees true reality (Being) in the ideal and looks upon the progressive imitations or impressions of the ideal in the world of phenomenon as unreal or phenomenal (Becoming) requires a deeper analysis of the data of pure consciousness (from which all fleeting and ephemeral sensations and perceptions

Positivistic thinkers will not accept him.

The returning idealism is not yet ready for the supreme heights of Platonic idealism.

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[1] *Cf.* Jethro Brown, Principles of Legislation and Lorimer's, Institutes of Law, Book I.

and the derivative thoughts have been abstracted) than what positivistic empiricism, engrossed in the contemplation and study of these phenomenal and fleeting (evolutionary) states of the objective nature as they are reflected in our minds, is prepared for. That pure reason independently of all experiences can deduce from the autonomous nature of man (itself alleged to be an *a priori* datum) the whole scheme of a perfect and permanent code of Law and life is a position against which the whole world has rebelled since the middle of the 19th century. The Historical School and, next, the Positivistic Sociological Schools have been searching for the principles of legislation and theories of law indeed also from "Nature," but not from its (pure) reason but from its objective appearances. Pure reason is contemplated by all almost alike; but appearances vary with age and locality and yield different results or conclusions to different enquirers. Hence Sociological Jurisprudence has had so many sub-divisions or schools, and their subsumption under a common head which is now felt to be necessary for the purpose of eliciting a final synthetic principle of law and legislation has become so difficult. The only direction wherein the synthetic principle of unity can be found is that of pure reason or consciousness wherein all phenomena converge and whereby they are all conditioned; and a recent but yet partial appreciation of this truth has just initiated a turning back of the enquiring Ego towards its own nature for the information it seeks about 'Nature' which on the one hand includes and on the other is conditioned by it (the Ego). Societies and social de-

Ideal code useless as practical guide.

Hence search in the domain of phenomena for the relative ideals.

With varied and conflicting results.

And the difficulty of their synthesis in an absolute and universal principle of law.

The proper direction of enquiry is now being gradually perceived.

mands are always changing. In all these changes we notice a craving for the ideal or perfect state of existence. Must we be eternally at sea about the correct principle to be adopted for these changing situations in the matter of legislation and administration of justice? Should we go on, at every occasion calling for legal changes, framing rules in accordance with the theories of liberty, power, or interest and social solidarity and thousand other materialistic standards and then compare them by their results; and in the meantime make a haphazard pragmatic selection of one while we wait for the demonstration of its claim or validity by actual success before its final acceptance? Idealism seeks its way out of this uncomfortable position to which materialism has led us by taking its stand on some principle in nature which does not change amidst the changes in the phenomenal world. The supreme height of idealism is reached when we identify the concept, *i.e.*, the logical determinant, with the ideal, the first cause or beginning with the final good or end; here the logical, causal or historical, and teleological unities underlying all phenomena are made to coincide. This is the final step in the advances in which Del Vecchio refused to accompany the metaphysical idealism, or rather realism, in Jurisprudence represented by Plato and the Stoics among the ancients and the 'Law of Nature' Schools of the modern era. The manifestation of the absolute in the world of nature or phenomena is a falling off into the region of history, science, diversity and causality,—into heteronomy, bondage, clouded reason, and individuality; and the only real

The present unsatisfactory condition of things.

How idealism seeks to solve the difficulty.

The supreme height of idealism.

moral law is a return to nature, the recovering or realisation of the original absolute unity—by the re-union, in love and sympathy, of the individualised or egoised portions of the absolute essence—to which only the light of reason and philosophy can show the way. My own idea is that the empiricists do not seriously deny that the perfect law in a perfect society would be somewhat like what the idealists sketch out as deductions from pure reason. What they really urge is that such ideas are idle dreamings and useless for the practical purposes of concrete legislation and justice which have to take account of objective situations and facts. It is now being appreciated, however, that the ideal is not absolutely valueless, for it serves as a barometer to indicate the moral altitude of a society and of its positive law; it stands as the acid test for the dross that the legal system contains; and, further, that the ideal cannot be reached by the mere examination of the existing systems. Once the search for the ideal is felt as a necessity and its proper direction, in order that it may succeed, is fully perceived, we expect to have in future sociological idealists in Jurisprudence of bolder types than Vecchio, whose business will be to build up the highest truths of all the schools into a synthetic whole in the light of the highest metaphysics of the Absolute. Positivism and induction, limited to the observation and experiment of phenomena alone, cannot yield generalisations which will embrace the totality. The totality of the phenomenal world is conditioned and substanced by the Absolute. The final and all-embracing synthesis can accordingly

The true position of the empiricists.

The business of future legal philosophers will be to build up the highest truths of modern science (sociology) into a synthetic whole in the light of the highest metaphysics of the Absolute searched

out through the metaphysics of the Ego. This can be achieved not by compromises, but by identifying the extreme positions of idealism and materialism in the Absolute.

never be attained till the Absolute is searched out, at least as far as is necessary and sufficient for the synthesis of all actual and possible legal phenomena. But in the search for the Absolute, Positivism has left out of account the only way in which it can be found—that which leads us into the metaphysics of the Ego. The modern compromises between idealism and positivism are unsatisfactory *because they are compromises*. The two opposite ends of the line of human knowledge can be made to meet not by any compromise arrived at midway in the line, but only when the extreme conclusions of positivism or materialism and of idealism are found really to tally in the Absolute.

# PART V

## The Bearing of the Modern Theories of Jurisprudence on the Practical Making, Interpretation and Application of Law

# LECTURE XI

## Legislation and Administration of Justice—Legal Hermeneutics.

The study of the modern juristic theories would be a comparatively barren and profitless undertaking if it did not offer us any assistance in the practical problems of legislation and administration of justice. A narrow conception of the scope and purpose of jurisprudence, cherished chiefly by the Analytical school, separates jurisprudence from the principles or theory of legislation on the idea that science of what *is* must not be confused with the *art* of what *should be*. We must, however, take a broader view and without going into details, examine generally the bearing of the legal theories not only on the problem of the Judge but also on that of the Legislator; for the two are fundamentally the same—both aiming at the same problem of serving individual and social ends, most efficiently and in co-ordination, through the help of the legal order.

Relevancy of juristic theories to the problems of legislation and administration of justice.

Narrow view of the English school in rigidly separating jurisprudence and art of legislation.

The two are fundamentally the same.

The fundamental problems of modern politics, says Jethro Brown, are "the organisation of the state and the definition of its functions."[1] We may likewise divide the problem of legislation into that of the organisation and of the function of the legislature, and the juristic theories of the State and Positive law are or should be valuable in helping us

The problem of legislation; its two departments.

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[1] Principles of Legislation, p. 41.

The organisation of the legislature.

in the solution of these problems. The question of organisation or structure is indeed somewhat remotely connected with jurisprudence and one might generally dispose of it with the remark that the best organisation of the legislature in a given society is that which makes it most suitable for discharging its functions most appropriately for the needs and interests of the society. The consideration of the latter question, *i.e.*, the question of its function would itself throw considerable light on the problem of the proper constitution of the legislature which belongs more intimately to the province of polities than of juristic theory. In ancient times the functions as well as the personnel of the King, the legislator and the judge used to be united in the same individual or body. The ruler was simultaneously the chief priest, sovereign and legislator as well as the head of the judicial, police, military, administrative and executive agencies and the differentiation or subdivision of the public or governmental departments was not acute or well defined as it is in our days. The principle of division of labour now adopted for the sake of efficiency and conservation or economy of energy in view of the growing complexity of modern social organisations and social needs has produced greater diversity of state agencies at the cost of unity and it has often troubled political as well as legal philosophers as to how the evils of differentiation (consisting chiefly in the uncertainty and conflict arising out of the possibility of different policies and principles being adopted by different public officials in their respective departments) can be remedied without losing the

Practice in ancient times.

The principle of division of labour adopted in modern times for (1) efficiency and (2) economy of energy.

It has however produced diversity at the cost of unity; but the evils of differentiation are uncertainty and conflict of Law; hence, the modern problem: how to avoid the evils without losing the advantages of separation of powers.

advantages of division of labour. Besides division of labour (and economy of force), Montesquieu defended the separation of the powers [1] on another ground, *viz.*, as the only means of guaranteeing the political liberty of the individual by putting legal limitations on the governmental authority. Laws would be arbitrary if the judge, the legislator and the executive officer be one and the same individual or institution whereas their separation would put a check on each other's abuse of powers and serve the cause of liberty. Montesquieu urged that the judicial authority and function with which (unlike the other two, *viz.*, the legislative and executive) the individuals have direct relations should not be assigned to a permanent body or class but to chosen individuals elected by the people and for a short term only; that the legislature should be consisting of two houses, one, of the representatives of the people, to assure the self-government of the people by laws made by themselves, and the other, composed of men distinguished by birth, wealth or glory and participating in the legislative power in proportion to their prerogative, importance or usefulness in the state, for improving the quality of the law. The two chambers must possess the right to veto each other's conclusion by way of mutual check; and the latter may perform the additional function of acting as a moderating body between the principal legislature (the people acting through their representatives) and the executive power which, demanding prompt action, should be confided to one man,

Montesquieu points out the third advantage of differentiation. It limits authority and serves the cause of liberty.

Montesquieu's suggestions *re* the judiciary: That the Judges should be elected by the people and for a short term; *re* the legislature: It should consist of two houses which must possess the right to veto each other's measures. The additional functions of the upper house;

[1] Esprit des Lois, Book XI.

*re* the executive, it should be the monarch.

Montesquieu's ideal.

*i.e.*, the monarch, instead of to several persons. Montesquieu had the British organisation of the state and the legislature as his ideal and his support of that ideal popularised it in America and Europe at the end of the 18th and beginning of the 19th centuries. You will at once perceive that the proposed prevention of abuse by the separation and balancing of powers militates against the paramount necessity of unity and concerted action that can only be secured by placing all these governmental departments under some common supreme head; and this may be done either by raising one of these departments (and this must be the legislature) above the others or placing them all under some other supreme and paramount individual or body that is above all temptations to make any abuse of its unique position and authority. So long as human nature does not rise superior to such temptations, abuse of powers will remain; and so long as separation and mutual limitation of powers will be necessary for the preservation of liberty the resulting disadvantages of a house divided within itself must continue in some shape or other. Nowhere in the actual social systems of the world, however, does a rigid separation of powers exist. It cannot, for diversity without unity spells annihilation. The executive power does not merely enforce laws but also makes rules, *e.g.*, of procedure, which are legally binding. Legislatures like the British parliament also pass administrative orders, they dominate the executive power, and besides perform important judicial functions. The judiciary are also credited with powers of indirect legislation. The powers and functions

The necessity of having a common supreme head for the sake of unity and concerted action.

The difficulty is unsurmountable through the deficiencies of human nature.

No rigid separation of powers and functions possible in modern societies.

Illustrations.

of the state are in actual practice sometimes distributed (for efficiency as well as prevention of abuse), by assigning different functions or different parts of the same function to different organs (separation of powers) and sometimes consolidated by assigning several functions to the same organ with different conditions, and different procedures.[1] So unity and diversity go together in the actual systems of power distribution. It requires collaboration, in these days of complexity, of several individuals and bodies not only for the exercise of all public powers and performance of all public duties but also for the collection of all necessary information of the various facts—causes, interests and ends of human affairs—all of which require ascertainment and adjustment before the formulation of the law and the other functions of the state can be efficiently discharged. All these cannot be properly done by one individual or body, so collaboration is necessary. It connotes unity as well as variety; the necessity of a supreme principle of unity placed above the separated departments for the sake of co-operation, strength and prevention of conflict, and the differentiation of the direct and immediate controlling and regulating agencies for the sake of efficiency as well as the prevention of monopoly and abuse of authority. It is thus that here also, as elsewhere, the growing complexities of evolving life lead from the unity of homogeneity to the unity of heterogeneity or organisation. So the problem of the best form of organisation can never be solved once for all. The solution itself

Unity and diversity go together.

Necessity of collaboration for exercise of powers and collection of materials.

Collaboration connotes unity as well as variety.

March of life from unity of homogeneity to unity of heterogeneity.

[1] Korkunov, Theory of Law, pp. 381, 391.

The problem of organisation cannot be solved once for all; the solution must grow along with the complexity of life.

must grow with the growth of the capacities and requirements, *i.e.*, of social life. Division of powers is not to be necessarily limited only to three departments, nor can the provision for their unity be fixed and restricted to one particular method or arrangement; but the difficulty of harmonising or co-ordinating the opposite principles of unity and diversity will never be overcome, and it will reappear in more and more complex and formidable forms as long as the individuals, especially those in charge of the governmental powers, do not develop their public wills and realise that the true self-interest of each individual or class,—of each department or section of the Government or the people—is identical with the interest of all the others.

Distinction between legislative or executive and judicial functions.

It is worthy of remark that the legislative and executive (*i.e.*, administrative) functions have a bearing chiefly on the regulation by law of the *future* relations and rights whereas the judicial function has more in view the adjustment of *past or present* relations and rights by past or present legal rules; but as we shall see hereafter, even this distinction is not quite rigid and constant. With regard to the problem of the best form or structure of the legislature, I may here summarise the pertinent and well considered observations of Prof. Jethro Brown [1] that the modern spirit of democracy or self-government wants that laws should be made by the people themselves; and the reasons are the same that led Montesquieu to favour the representative legislature of England. The view that legislation should be

The best form of legislature.

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[1] Principles of Legislation.

in the charge of a single individual is not now-a-days commonly maintained; but there are many who yet subscribe to the idea, advocated since Plato's time, that it should be vested in a few individuals of tried honesty and capacity than in the ignorant masses who hardly know what their true interests are and much less how to further them by proper laws. This view, however, is opposed by the sociological jurists who attach the greatest importance to the "social or popular will" and its development by education and exercise. No doubt "social will," truly interpreted, represents not the passing whims of the masses or the majority but stands for the real abiding interests of the society. It is true, says Brown, that an enlightened monarch or a few wise statesmen of catholic sympathies may represent the social will, *i.e.*, understand the real interests of the society and give effect to them by laws, better than the ignorant masses (in a democracy) or the parliamentary majorities (in a representative government); but the constitution of a popular or representative legislature affords better opportunities for the education, exercise and development of social will in the masses. With proper safeguards in the shape of debates and discussions in the press, the platform and in the legislature itself, and with more extended training in politics and economics introduced in the educational curriculum, the people or their representatives will, it is expected, gradually come to understand better their real interests (at least when they are reduced to broad issues) and express a fairly intelligent and reasonable opinion for the purposes of legislation.

Different views: (*a*) Representative, like the British Parliament; (*b*) senatorial or aristocratic.

The latter opposed by the sociological school.

Jethro Brown's views.

The evils of the democratic spirit.

Questions regarding the merits and evils of lesser institutions, like the bicameral legislature, proportional representations, party unions, etc., proposed or formed since the rise of the democratic spirit, have been occupying and exercising the minds of political philosophers. They only prove that when the evils of unity (arising chiefly out of its abuse of powers through motives of self-interest) are sought to be counteracted by the introduction of a dose of division or diversity, for the sake of economy and balancing or limitation of powers, new evils, more complex and serious, crop up chiefly in the shape of conflict, competition and undue pursuit of self-interests of individuals and classes who are raised to a position of authority and influence before they had sufficiently developed their public will.

How they arise.

Bad laws and misuse of legislative authority are mainly caused by ignorance, or disregard of the true interests, on the part of the legislative body. This is due either to the deficiency of the intellect or of the heart of the persons preponderating in the legislature. It may arise through want of sufficient facts that ought to be ascertained or of the capacity to weigh them properly in their true bearing on the subject matter in hand; but the danger of misdirection is the greatest when the intellect is blurred by their selfish instinct or defective morality for which it is difficult to find an effective external or objective remedy. The true and sound treatment of a will defective for its ill developed morals must be primarily subjective; and objective checks and balances can at most be of assistance only as auxiliaries.

Their true remedy.

The limits of legislative power and policy.

With regard to the questions dealing with the (extent or limits of) legislative power and policy, which arise independently of the form or constitution of the legislature, the juristic theories are divided; each supports the view that accords with its conception of the nature of the Society and Law. The Analytical and imperative theory of law based on the mechanical conception of society would regard the legislative power of sovereignty as unlimited in extent, capable of giving to the society and the individuals any legal system, for their organisation and adjustment of mutual interests and rights, that it desires or thinks to be just and beneficial. It would not regard as impossible the importation of foreign and more advanced standards of justice for the betterment of indigenous legal systems. The Historical school would advance and support the opposite extreme theory that puts rigorous limitations on the legislative power, insisting on the impossibility of effective legislative interference for the introduction of radical legal changes against the trend of the national spirit or genius. The Historical theory of law regarded physical and social phenomena as equally causal, *i.e.*, determined in their character, and repudiated all attempt at voluntary and deliberate teleological changes thrust on the national legal systems which (they hold) had unconsciously and spontaneously grown up as a product of national life with natural characteristics which are different in different societies. The Organic and early Sociological (positivistic) schools followed suit on the question of the limitation of legislative power though for slightly different reasons. The Organic

The Analytical view.

The Historical view.

The Organic and early Sociological (positivistic) schools' views.

view was that you cannot, by introducing external and voluntary changes of conditions or internal re-arrangements, change the nature or characteristics of an organic growth (like a plant or tree) which are determined from beforehand by its innate organic nature; and the organic conception of the society led necessarily to the idea that legislative changes can be of use only in so far as they assist the society to develop along its pre-determined organic lines by the attenuation or removal of impeding or injurious circumstances or influences. The Positivistic view laid stress on the paramount power of environmental and antecedent natural (physical), racial and economic influences and reduced even human will and its autonomy to the position of a natural causal product of these antecedent and environmental forces. The natural order (including social forces) imposes limitations on legislation; and the legislator is but the mouthpiece of the dominant social forces of the time having no freedom or power to go against them. The modern trend of sociological juristic theory, however, has, due to the impetus given to it by Jhering and the Psychological school, again veered round and come to acknowledge the possibility of the human will rising superior to the (physical, ethnobiological and economic) social forces and effecting deliberate legislative changes by their proper adjustment and regulation, *i.e.*, by "the lever of interest," with a mastery that grows as the society develops its psychic faculties. This school has come to combine natural causality and human teleology without ignoring or too much restricting the first like the Imperative school nor the second like

**The modern sociological view reconciles the Analytical and the Historical views.**

the Historical and Organic schools or the positivists.

Legislative policy; how it is affected by one's views *re* limits of legislative power and *re* nature and end of Law; and itself moulds legislative method.

The view which a theory of jurisprudence holds on the question of the limitations of legislative power naturally influences its legislative policy; and both are determined to a great extent by its conception of the nature and end of law. The legislative policy in its turn largely moulds the legislative method, and the juristic theories may be examined here with reference to their bearing simultaneously on the questions of the policy and method of legislation. The policy of Laissez Faire, *i.e.*, of legislative non-intervention or minimum intervention, is dictated by two distinct ideas which ought to be differentiated; the first is the idea (prompted by the individualistic tendency and the mechanical conception of society, supported also by the cognate principle of classical economics) [1] that the best legislative policy calculated to promote the utmost individual liberty and most energetic accumulation of individual wealth and property is to let individuals alone to pursue freely their own ends and interests with just the minimum legal control on their movement necessary for the sake of social peace and security. Society as a mechanical sum of the individuals will thus naturally develop in the direction of liberty, security and wealth along with the individuals. This is what inclined the (English) Analytical, the Formal, and the Historical schools to the policy of non-intervention and minimum legislation. The second is the result of the scientific spirit of determinism which was born with the rise and growth

Policy of Laissez Faire prompted by two distinct ideas or principles: One, based on the mechanical conception of society and the principle of classical economics, influenced the Analytical, Historical and Formal (Philosophical) schools; The other based on the scientific

[1] *Vide* Lectures III and IV.

Principle of determinism influenced the early Sociological schools.

of the Historical school (when it first threw its gauntlet against the rationalistic theory of Law of Nature that favoured extensive positivisation of the Law of Nature by Codes) and steadily grew till it obtained its maximum scientific sanction and emphasis in the hands of the (Positivistic and Biological) Sociological schools. Legislative interference being, according to this idea, possible only in a very limited degree, there was no room here for an active and vigorous legislative policy. The celebrated Savigny-Thibaut controversy regarding the feasibility of a perfect German code is important as marking the crucial meeting point of the two opposing tendencies of rationalism and nationalism—the idealistic eagerness for a code formed after the perfect Law of Nature (as materialised in the matured Jurisprudence of Rome) for the modelling and regulating of the society by the force of legislative will (the imperative idea) on the one side and the nascent scientific and national spirit that recognised the causality of national antecedents to be too strong for individual wills (directed to realise Utopian ends by legislation) on the other. It is thus that Laissez Faire thrust itself as the proper legislative policy on the Historical school under the double influence of both the above ideas, whereas the Analytical and Formal theories at that period were influenced only by the first. The Organic theory of the Krausian school had accommodated itself to their philosophic idealism[1] and accordingly subscribed to a policy of moral supervision and restraint of individual

The opposite view of the rationalistic schools of Law of Nature.

The crucial meeting point of the rival views.

The middle position (between the Rationalistic and Historical school).

[1] Which soared above the individualistic tendency and mechanical conception of the earlier schools, see Lecture V.

freedom by law to make the society approximate the realisation of that organic ideal by harmonious development of all its parts into perfection. The scope or direction of this legislative restraint and guidance was thus necessarily subject to natural limitation but not to the same extent as the Historical and the Positivistic or Biological sociologists would press it. It was since the time of Jhering and the rise of the Psychological school (and also since the Neo-Philosophical schools,[1] by their concessions to the scientific principles of causality and natural evolution, and their surrender of the doctrine of an absolute and permanent Law of Nature, succeeded to recover a hearing and position of influence which their predecessors had all but wholly lost) that the moral duty of the legislature not to let things drift but to intervene in the interests especially of the weaker classes and individuals came again to have the support of the modern juristic theories. Modern psychology proved the scientific feasibility of such intervention which Jhering and his followers on one side and the Neo-Philosophical theories of jurisprudence on the other asserted (in consonance with common sense) its paramount need or desirability. The legislative policy of civilised states has accordingly come round to favour judicious state control by deliberate and far-seeing legislation. The efficacy of deliberate effort at the amelioration of the society and law came to be accepted in sociology and juristic theory as soon as the conception of the society as a super-organism or a personality (first preached by[2] the philosophical

of the evolutionary (organic) metaphysical schools.

Revival of the policy of legislative intervention since the rise of the Psychological and Neo-Philosophical schools.

The veering round of the legislative policy of modern states.

[1] See Lecture VII.

[2] See Hegel, Lecture III.

school) had secured some sort of scientific data to establish itself as a fairly accurate representation of the real fact. Of course the Neo-Philosophical schools of the time[1] had no hesitation or difficulty in falling in with the conception for which their predecessors since Schelling and Hegel had already in a way prepared them. As they had all along, in proportion to their idealism, enthroned the human reason and will above the determinism and causality of external nature (or environments) they, even more readily than the Sociological school proper, rose above the comparatively passive attitude of the Organic school and their theory and conception of society and law and came to advocate an active *culture-staat* with a vigorous legislative policy for the cause of culture (Neo-Hegelianism) or the positivisation of the Law of Nature (liberty) with a variable content (Neo-Kantianism). It is instructive to note that the legislative policy of juristic theories varied along with their attitude regarding the relation of law and morals. Rigid separation of law and morals generally encourages or accompanies the legislative policy of non-intervention in legal theory, whereas the opposite favours state control; and it is expected that a greater development and wider acceptance of the theory of personality of the society or state will lead to a greater unification of law and morals along with a more vigorous advocacy of moral or social legislation.

Legislative policy varies along with the conception of the relation of law and morals.

This change of the legislative policy (in juristic theories as to the proper function of the state) as

The march of ideas *re* legislative policy.

[1] The Neo-Kantians and Neo-Hegelians.

indicated by the technical expression "from Recht-staat to Culture-staat" is noticed in the philosophical as well as the scientific schools. From Kant to Kohler we see the same march of ideas as we see from Savigny to Jhering.[1] Prof. Jethro Brown correctly interprets the modern view as regards the relation of the above two aspects of the state policy where he asserts that the latter involves no real contrariety with or departure from the former but is only a fuller reinterpretation of the ideal of liberty. The true liberty of the individual is that of self-realisation, not of self-annihilation. Laws abrogative of liberty to do mischief are really promotive of the higher self-disciplined liberty that makes for the individual's higher good or happiness. State regulation or control by law is conducive to liberty in cases where (as in criminal or sanitary laws) it restrains each and every individual in the interests of all, or (as in factory legislations) a few in the interests of the many or (as in laws for the protection of the unpopular sects or classes) the many in the interests of the few; or where individuals (like lunatics or habitual drunkards or criminals) are restrained in their own interest.[2] Kohler argues that the state demands sacrifices on the part of the individual in the shape of service of his body and life and contribution of wealth or property for the sake of the general welfare and culture, for otherwise not only

Jethro Brown's interpretation of the change.

State regulation when conducive to liberty.

Kohler's support of State's demands.

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[1] The same is reflected in Sociological Jurisprudence as it developed from Gumplowicz or Spencer to Jellineck or Salleilles, see Lecs. VI and VII.

[2] Principles of Legislation, Ch. I.

would the state perish but likewise the individual would be fettered and bound in liberty and culture.[1]

Proper Legislative policy.

The proper legislative policy is now supposed to be the harmonisation of both the principles of unity (state control) and diversity (individual freedom)—the utilisation of the benefits of both by the prevention of the evils of excess or abuse of each.

*Legislative method.*

With regard to the question of legislative method (which, as I have already told you, is intimately related to that of legislative policy and of the nature and end of law), the Rationalistic theories

The Rationalistic method.

would advocate the method of evaluating legal notions, principles and practices by reason (or the standard of Nature,—objective or subjective—supposed to be fixed by divine reason) and retaining, abrogating or modifying existing principles and rules and introducing new ones so as to secure a positive system as nearly approaching the ideal standard of nature or reason as possible. Its critics

How viewed by its critics.

of course have denounced this method as unreal; they say that it does not grapple with the hard facts and realities of life, but proceeds on *a priori* assumptions (often disproved by experience) as to human nature, its limitations, needs and desires. It does not take into account the causes, as also the effects upon social life, of legal phenomena, *i.e.*, the real causes and effects as ascertained by experience and investigation; and proceeds entirely on the uninformed fancy of the legislator regarding both the ideal and the means. The cardinal rational principle,

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[1] Philosophy of Law, p. 209.

*e.g.*, of liberty (Kant), or inviolability of human personality (Boistel), etc., that is taken as the guiding principle of legislation gives rise, by a deductive process, *i.e.*, as handled by the rationalists, to a whole scheme of principles and rules in which there is little room[1] for distinguishing different individuals or different circumstances calling for variations in the degree of liberty or inviolability of person that should be conceded by law to the individual in different cases and situations. A slight knowledge of the realities of history, it is urged, suffices to establish that such fanciful *a priori* schemes and projects often give rise to results which are the very opposites of what had been anticipated[2] and that the correct forecasting of

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[1] *Cf.* the scheme evolved in Lorimer's Institutes of Law, Lec. X, Appendix.

[2] For instance, the theory of Natural right (or liberty) of the individual and the principle of *Laissez Faire* ended in the degradation and bondage of the labouring masses; conversely, as Kohler points out, "the ambition of a half barbarous Macedonian demolished the Persian empire and a flow of occidental culture poured out over the orient." May we not however point out that even the thoroughly calculated scheme or policy of partial concessions to pacify the rising expectations of the Indian subjects has unexpectedly contributed to the increase rather than the diminution of the discontent? Intuition is indeed often unreliable; but the question is, can forecasts based on calculation, which often prove to be inaccurate in the world of physical forces and phenomena (due to some causal element being missed or misconceived in the account), be more reliable in the infinitely more complex and difficult world of moral and social forces and phenomena? The relative reliability of intuition (rationalism) and scientific calculation (positivism) on observed causes —antecedents and environments—becomes really a very debatable point seeing that the intuition of man is itself held by science to be the result of automatic or subconscious calculation based on the experiences of generations and races and of the whole humanity and registered by natural processes in the human constitution. Calculation becomes reliable only when all the causes and their laws of operation are

results expected to follow a course of conduct must be based on an exhaustive and laborious scientific investigation of the facts, *i.e.*, the various forces and circumstances—and of the laws of their operation in presence of each other. The Systematic, expository or statistical (analytical) method accordingly insists on the collection of exact data (*a*) concerning the situation upon which legislation is to operate, (*b*) concerning the most effective measure to be applied to such cases, and (*c*) concerning the effect of the enforcement of the selected measure upon the particular situation and its reaction upon other social habits. This programme of preliminary spade work is itself formidable enough, but it cannot be shirked; and it is rendered still more formidable when it is noticed, as Prof. Ross points out, "that any established policy which affects persons favourably or unfavourably will be anticipated and will modify behaviour and the social scientist or legislator must anticipate the anticipations."[1] The comparison of the above rival methods really involves the same considerations that had cropped up in connection with the old rivalry between the doctrine of moral sense and utility discussed by Austin[2] and they still await their final solution by the synthetic legal philosohpy that is to come. The Historical and Comparative methods serve only to enlarge the scope of the Systematic or analytical method by—all-

The Systematic, expository or statistical method.

The Historical and Comparative methods.

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correctly embraced in it—a condition as difficult of attainment as for human intuition to reach the full unerring vision of the Divinity or the Absolute.

[1] Leg. Phil. Series, Vol. IX, p. lxiii, note.

[2] See Lecture IV.

ing for a broader kind of statistics based on legal history, comparative law and legal ethnology; for, according to their legal theory, the facts of human, *i.e.*, social, life are not detached points in space but are expressions of a unified historical process running in a continuous line through ages, and the inner rationality of this process necessary to be apprehended for the practical purpose of legislation becomes discernible only by a comprehensive examination and collation of its operations through long periods of time. The ascertainment of this necessary principle of rationality must be made by historical and comparative studies (which afford vicarious experience) of social and legal institutions and their effects and causes supplemented by legal ethnology which is peculiarly serviceable for restoring missing pages of history and for understanding the ethnic soul which constitutes the material on which legislation has got to operate for its desired results.

The Pragmatic method.

As regards the method of experiment which, added to that of anticipation referred to above, makes up the doctrine or mehod of *pragmatism* which is favoured in Anglo-America and which I have discussed in a previous lecture, Prof. Kocourek deprecates it for its want of strict observance of the conditions of scientific observation and besides remarks that "mankind does not possess such reserves of spiritual force that it can afford to squander its energies in attaining at a loss what can be acquired with profit."[1]

Kocourek's criticism.

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[1] See Lecture VIII.

The defect of the Analytical and Historical (Comparative) methods; hence, the Critical or Philosophical method.

You will perceive that neither the Analytical nor the Comparative and Historical method presents a definite ideal or end which is certainly the chief determining element in the choice of methods. Neither of them does afford a test by which we can recognise an improvement of conditions. The Critical or Philosophical method professes to supply this desideratum and proposes to fashion the method after, or with a view to, the ideal. The 'utility' of the Analytical theory is not only vague but it is vitiated by its individualistic tendency to sacrifice or crush the numerically weaker interests, *i.e.*, of the minority. The Historical theory or method is negative in character being directed more towards prevention of mistakes than towards upraising the society to a higher ideal; for it regards such an ideal (beyond what is reached naturally by the agency of the historical and environmental forces) as unattainable. The modern Philosophical schools offer Culture or Liberty as the ideal; and subordinating method to the ideal, would accept any method proposed by the Analytical or Comparative theories judging, choosing and applying the same in the light, and towards the attainment, of that ideal or end.

The Psychological method.

The modern Psycho-sociological school, quite in accord with their theory of law proceed, along the line or method of legislation for the balancing and equilibrium of interests so as not to crush the weaker interest (*per contra*—the Analytical Imperative schools) with a view that the Law may keep abreast of social evolution without remaining behind as a laggard (*per contra*—Historical School) and without going as far as the Philoso-

phical theory and method of setting up a high ideal for the upraising of the society. It compromises with the Positivists and the Historical (the Comparative and Ethnological) schools by holding that the ideal set up for the direction and guidance of the legislative method should be such as is suited to the actualities of life (*contra*—Metaphysical and Formal schools), *i.e.*, the social circumstances, interests and aspirations of the time.

Uncertainty and conflict of legal theory regarding the mode or spirit in which diverse conflicting interests in society should be regulated by legislation.

There is no longer any difference between the philosophical and the scientific schools regarding the necessity and importance of experience (by which term is included every data including those of statistics, legal history, comparative biological, social and legal sciences and legal ethnology). But there are yet differences and good deal of uncertainty regarding the mode or spirit in which these facts and experiences must be handled for the purpose of framing suitable laws in view of them. There is, for instance, yet a conflict of views regarding the cardinal point, *viz.*, how must legislation deal with the conflict of interests between classes and individuals or between either and the society ; whether the higher interest must wholly override the other or should there be a compromise attempted by law ; and then again, how should these conflicting interests be valued for the purposes either of selection and preferential protection of the higher interest, or of compromise and adjustment of both through legislation. The Neo-Hegelian may probably set a higher value on the ideal or higher interest and agree to the forcible suppression of the lesser interest for the sake of 'culture' and cite the natural history of legal

evolution in support of his position.[1] Jhering on behalf of the Sociological school on the other side would seek to improve upon the natural method of struggle and conquest (involving cruelty and bloodshed) by adopting an intelligent course of peaceful compromise of interests as the method of legislation. Conversely, the Sociological school will be more inclined dogmatically to prefer the social (or State's) interest as necessarily the higher, having a superior claim than individual or class interests to legislative support; but the Philosophical schools, especially the Neo-Kantian, would be more inclined to be less dogmatic about it and to put all kinds of interests equally to the test of their ideals and prefer only those which under the circumstances are decided or supposed to further the cause of that ideal irrespective of their individual or social character.

Impossibility of a universal theory of legislative ends and methods.

It is clear however that no general legal theory covering all ultimate and mediate ends and the proper steps for their attainment can be enunciated for the regulation of legislative method which must adapt itself to the variety of problems as they arise for determination. To posit the possibility of such a theory involves the same mistake as the old theory of Natural Law itself. In fact the principles of legislation should have some flexibility to render possible their adaptation to a variety of circumstances and ends.[2] But absence of legal theory altogether, to guide the legislator and to supply him with

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[1] Berolzheimer referred to in Vol. IX, Leg. Phil. Series, p. lviii.
[2] *Ibid*, p. lix.

proper tests in the selection of his ideals, ends and methods will be disastrous. The legislator must be allowed some discretion in fixing his policy and method but there must be well considered juristic theories to help him out of the confusion arising out of a heterogeneity of ends and methods by pointing out the correct principles of selection. Take, for instance, some of the broad questions discussed in Prof. Jethro Brown's "Underlying Principles of Legislation":—1. The enforcement of morality in society. 2. Legislative or governmental philanthropy. 3. Class legislations. 4. Trade and industrial competition. 5. The institution of property. 6. The individual's rights relating to life, liberty, marriage and work, and opportunity or facility for a career according to his talents and also to do his duty according to his own conscience. The legislator who has high moral ideals will naturally be eager for active legislation in furtherance of the first in the shape of puritanic measures penalising for instance all sorts of intemperance or sexual licence; one with large sympathies will be equally eager for extensive legislative measures for the relief of the unemployed, the poor, the weak and the distressed, providing pensions, insurances, relief works, public charities and minimum scales of wages, etc. But too much paternalism in legislative method may induce forced morality, hypocrisy, secret immorality and evasion of laws in society and stand in the way of self-determination or liberty of individuals. Over-strict state regulation, by law, of the individual for the development of higher social and individual morals may, inspite of its good will

The legislator's discretion should be guided by sound juristic theory.

Illustrations.

Moral legislations.

Philanthropic legislation.

Evils of paternalism.

and honesty of ideal, produce greater unhappiness in society by reducing every individual to the position of a state prisoner. A general code of compulsory morality may not suit all characters and situations,—may not be even good for all; much should be left to individual judgment. Fear of punishment is not always the best, perhaps it is the worst, mode of moralisation of the individual. It may be useful or necessary for abnormal or ill-developed characters like dipsomaniacs, idiots, or children, not so much for normal adults. Conversely excess of maternalism in legislation may encourage idleness and discourage self-help and self-reliance. No one can deny the use of class legislations (for the benefit of classes put under disadvantage through economic conditions) but there is danger of bringing on opposite evils rendering fresh class legislations necessary for turning the balance. The medieval Statutes of Labourers, the Statute of Apprentices of the Elizabethan Age and the Corn Laws in the 19th century were class legislations in the interests of the upper classes, *e.g.*, the masters and the landlords; and they had to be followed up again by the Factory legislations and repeal of the older laws in the interests of the masses. The question as to best mode of regulation of trade and industrial competition has been a formidable problem for juristic theories regarding legislative policy and method. Competition is useful as a condition of progress and must be encouraged and at the same time it must be moralised. It encourages effort in self-interest, cheapens and improves the quality of commodities; but it also leads to unfair combinations and practices (*e.g.*, for creating monopoly), waste of effort

Evils of maternalism

*i.e.*, Regulation of trade and industrial competition.

and materials, and when not regulated by law, becomes cruel and vindictive. The ordinary legislative methods of (*a*) legal control, (*b*) administrative control, and (*c*) public ownership of trades and industries, for the moralisation of competition, have each their defects; the public or the injured parties may be too apathetic (and they find it too troublesome or expensive) to seek the remedies of legal control; the administrative control involves fresh burdens on the state, multiplication of officials and perhaps fresh taxation for costs. Public ownership of trades and industries (as proposed by socialists and communists) will moralise competition out of existence altogether and thus deprive the society of its benefits. The recent combinations of capital in the shape of "Trusts" are causing great anxiety. Their cruel exploitation of the producers and employees by dictating selfish terms which (in the absence of other competing purchasers or employers in the field) cannot be refused, and of the public (consumers) who have got to submit to any price they might choose to fix for their commodities, and their merciless method of underselling and running down competitors in trade and industry with the help of their superior capital and staying power, have become a serious matter urgently calling for the intervention of Law. They have no doubt immensely contributed to industrial economy and efficiency and are capable of rendering incalculable service if they are animated by noble aims and pursue wise methods; but how can legislation solve the problem? To suppress them altogether by legislation, *e.g.*, by declaring them illegal, or by public ownership

Legal control, administrative control and public ownership

Trusts

of trusts, would be to deprive the society of their advantages and involve the destruction of individual enterprise. Kohler's proposal, *viz.*, to take advantage of economic laws and permit withdrawal of shareholders and their capitals from trusts at their will, is one that would encourage breach of faith and contract, and revolutionise the company and corporation laws and institutions. In fact the evils of competition will come back in ever new and interminable forms so long as the bulk of the society is not animated with a higher ideal of honesty, good will and sympathy and disinterestedness; or in other words, does not develop what has been described as the "reality" of "public will" or "social will." It all depends upon the realisation of this which is the highest ideal of all human effort, of all morality and law and legislation; and which, once realised, renders the accomplishment of all the rest not only easy but as a matter of course. All communistic and socialistic or Bolshevic schemes must depend for their success on this (*i.e.*, the realisation of "the public or social will" by the individuals); without which, the result of the adoption of such schemes will be this, that the necessary impetus for individual activity, enterprise and "culture" secured by the institution of property and competition will be taken away from the society without a sufficiently compensating substitute. They are perfect for a society of perfect "public wills," they offer a perfect Utopia for utopian characters; and their practical services to the modern societies and states consist in forcibly presenting to the latter an ideal and pointing out

The necessity of developing public or social will in society.

their present deficiencies, as well as in exposing the dangers (as in present Russia) of thrusting in ideals too high for the societies or individuals who are yet insufficiently developed in moral and intellectual attainments to profit by them.

Natural rights.

The subject of the natural rights of the individual and the proper legislative policy and method with regard to them has been debated threadbare in legal theories. From the doctrine of Natural Law and the paramountcy of the natural rights of the individual (countenanced by it, and supported by the individualistic theory of social contract and the mechanical conception of the society) at one pole to the sociological doctrine of the society as the origin and creator of all individual interests and rights, which must accordingly be relative and subordinated to the social needs and interests, at the other, we have a whole gamut of juristic theories which need not be repeated again in detail. Most of them attempt some sort of reconciliation or mutual accommodation in the shape of balancing of rights and interests.

Illustrations.

The individual's right to life for instance raises the problem of the desirability or propriety of capital sentence. His right to liberty calls for a discussion on the institution of slavery; the right to marry and have a family life brings up the questions of endogamy and exogamy, eugenics, marriage of physically and morally unfit persons (as well as the compulsory marriage of those who may desire to remain, or are expected to be more useful to society by remaining, unmarried and devoted to scientific spiritual or patriotic pursuits). The right to property (*i.e.*, individual property, and the converse

claim of the individual to have a share in all property) has already been examined. The right to work as one wishes, contracts or agrees was debated in the factory legislations. The right to demand or get work and employment as well as proper and equal facilities (for persons irrespective of position, rank or wealth, provided they have talents or merit) for the highest careers has become a cause for complaint and a subject of serious anxiety in all societies overridden by unemployment of the poorer classes and the privileges and vested rights of the upper or higher. The question is what legislative policy or method should be adopted for dealing with these problems? Then again what degree of liberty should be allowed to the individual to do what, according to his conscience, seems to be his moral duty although it transgresses the law, supposing the law is really defective and lower in its standard than the conception of moral law entertained by the individual? That is a question which perhaps exercises and troubles many of the foremost thinkers and patriots as well as the legislators here in India in the present day. The problem of the proper adjustment of capital and labour is getting keener and keener every day in these days of strikes and dislocations of trades and industries brought about by them. This is how the question of legislative policy and method has assumed an unprecedented importance for the theories of jurisprudence in our days.

**Legal method in administration of justice.**

Legal theories have been at variance also on the question of method in administration of justice; and there is close correspondence between their respec-

tive attitudes in this and in the matter of legislation. So long as legislation had not taken up its present position as the chief law-making organ of civilised societies the judges used to exercise, in practice if not in theory, the powers of judicial legislation more extensively than it is now possible for them. The 'Themistes' of the ancient hero-kings, were real sources of law although they were supposed, or presumed to be, in accordance to unwritten customary principles. The divine inspiration would be claimed in support of the judicial authority to justify their acceptance as good laws. But as soon as a general fund of legal principles (in the shape of legislation—statutes or a code—well developed by interpretations, or a sufficiently comprehensive body of precedents embodying the principles of customary and common law, or both) came to be well ascertained and available to the public, the method of judicial decisions was reduced to what may be called the scholastic or dialectic method which, with characteristic formalism, allowed but little freedom of action to the judges whose function was practically limited to the formal or logical application of the pre-existing general rule of law within which the particular case in hand could naturally, or by ingenious fiction, be brought as the second or minor premise in a syllogism. Of course it is necessary for a juristic theory that insists upon the formal or deductive method of administration of justice to assume that the pre-existing fund of legal principles and rules is capable of covering every future question of litigated right and justice; and provided, and so long as, that

Judicial legislation of the hero-kings in earliest lines.

The formalism of formal or deductive method of later days.

Necessary assumption of this method.

assumption is well founded there can be no just ground for resiling from the theory that judges should not be allowed to depart from those principles and rules at their option and make divergent and conflicting legal decisions (as different judges may have different views of justice) dangerously shaking the certainty and uniformity of the law which are its greatest and most essential elements or attributes. Freedom of judicial decision may also give rise to corruption. In England and America, where judicial decisions of the highest courts are authoritative and binding as precedents,[1] the effect of the free exercise of judicial discretion will be still more dangerous, being not limited to the decision of the particular case itself; and accordingly the systematic or deductive method has been in vogue in these countries. In modern times, since the clash of the older legal principles and the growing needs of justice (amidst the complexities of relations introduced by the enormous advances, of form and method, in commerce, trade and industries, and the economical disturbances created by over-growth and domination of capital) has become very prominent (and especially in view of the fact that legislatures had almost everywhere been both to depart from the individualistic principles of the French Revolution and slow to

1 See for an exposition of the different attitudes, in this matter, of the continental legal systems and those in England and the United States of America, Holland's Jurisprudence, Ch. V. The continental view that a judicial decision is not authoritative as precedent, but only instructive, is an inheritance from the law of Rome as finally established in the Institutes and the Digest; and it has been expressly accepted in the Prussian and Austrian codes and tacitly adopted in practice and theory in France, Italy and Belgium.

readjust the relations of individuals and classes by legislations controlling contracts and contractual rights and liabilities), a new juristic theory of free judicial decision has come to be preached with great earnestness which goes to the opposite extreme and demands that the judge should be allowed freely to use his subjective sense of justice in deciding legal disputes, and if necessary even to disregard a statute whenever, although unambiguous and fully covering the case, it does not satisfy the demands of justice. Such a procedure however, although very forcibly advocated by Fuchs, can scarcely be admitted, for the reasons explained above, in England and America; and even in the other countries it would be objectionable for its tendency to create uncertainty and corruption in the administration of law in the courts. The third or sociological method, which has a much larger number of adherents in the present day than the other two (notably Geny, who may be said to be its founder, Ehrlich and others) admits, in general, the urgency of the necessity and the cogency of reasoning in support of the second view, but would nevertheless discourage the judge's open disregard of the pre-established statutory and other legal principles except after a critical balancing of the subjective sense of justice of the judge and the objective legal order of the society. The evil effects of the frustration of substantial and real justice, due to blind adherence to a theoretically perfect statute or principle of unwritten law, in the decision of a concrete case must be balanced with the evils of uncertainty arising from the departure from the letter or principle of a pre-existing but ill-suited law.

**The newly advocated method of free judicial decision.**

**The Sociological method.**

They ought to be weighed against each other and the judge must regulate his procedure accordingly.

**Interpretation of Statutes.**

That the utmost certainty and uniformity, *i.e.*, the unresilability of law like that of the laws of external nature (although it is in certain respects a theoretically most desirable state of things in society and in administration of justice), is in fact unattainable except at the cost of justice itself, becomes clear as soon as society is recognised as a living and growing entity. The conflict of the demands of justice suited in each case to its peculiar conditions and circumstances and those of certainty, uniformity and publicity in law, as noticed in connection with the question of judicial freedom *in general*, also affects the cognate question of judicial freedom *in the interpretation of statutes*. Here also considerable, we may say almost unlimited, latitude used to be given to lawyers and judges in the matter of "interpretatio" in early times in Rome and also in England; and there, as in Rome, the legal development in both its departments of common law (including statute law) and equity is to a great extent attributable to it. The question however as to the limitations of judicial power in these matters has become acute in the continent of Europe since the law became stereotyped and immobile after the continental codes. The Natural Law Schools of the 18th century, in accordance with their general juristic theory of the perfect code of Nature, had urged the possibility as well as the desirability of a complete human code formed after the pattern of Law of Nature which would be perfect and good for all times. There was also the growing demand of the masses

**Great latitude allowed in early times.**

**Present controversy on the point.**

for written and complete statutory guarantees of their natural rights, especially in Germany and France; and now, as soon as a complete codification was made, both juristic theory (of Nature) as well as popular sentiment came logically to subscribe to the canon of "genuine" judicial interpretation of statutes, *i.e.*, interpretation confined to the letter of the statutory rules, without liberty to the judges to add to or restrict its meaning or scope. Such liberty was deemed unnecessary as well as mischievous; unnecessary because the code was perfect, and mischievous because any departure from the statutory rules would certainly be unjust and imperfect and besides would give rise to corruption as well as uncertainty and insecurity of rights.

'Genuine' interpretation supported by the schools of Law, of Nature and popular sentiment.

The Historical School, no doubt, repudiated the Law of Nature and distrusted the code formed after it. Legal principles, according to them, are not to be made, *i.e.*, by legislation, but discovered by the history of the law. But that school (with some incongruity, it must be said, to their legal theory) so glorified the Roman Law (which they had made a subject of special and passionate study) as to regard its principles to be almost as complete and perfect for all classes or societies as the Natural Law schools regarded the Natural Law and the codes formed after it. The English and American lawyers (of the Natural Law School)[1] imbibed the same devotion and admiration

Similar view of the Historical School and of the older generation of English and American lawyers.

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[1] *i.e.*, of the Blackstone groove. The German Historical School later on taught the English and Anglo-American lawyers to respect the principles of common law as the spontaneous and natural (and

for the English Common Law. Thus the result was that inspite of the widest differences in their respective juristic theories the Rationalistic and Metaphysical schools of Law of Nature, the Historical School and the earlier Analytical School (which included the English and Anglo-American lawyers of the older type), all of them, came to support the view that the Judges had no liberty in the matter of the administration of the law, and that they must be limited to a course of deduction of rules from the perfect pre-existing law (either a code or the Roman Law or the English Common Law) for the decision of particular cases and to a course of 'genuine' interpretation for the purposes of such deduction.

The more recent view of the English School.

The English Analytical School, after it had shaken off the 'Natural Law' groove of thought, ceased to subscribe to the creed of a perfect code; on the other hand it had never countenanced the view of the Historical School regarding the utter inefficacy of legislation. There must be gaps, according to this School, however careful a legislative effort may be; and no code can provide for all future situations and contingencies. The Common Law (or customary legal principles) also was not perfect; and so the judges must not be limited simply to a course of deduction and logic but should also use discretion, at least to fill up the omissions and deficiencies by evolving

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therefore perfect and ideal) product of the rational genius. This helped the continuance of this sentiment even down to recent days.

suitable new legal principles,[1] as required for the purposes of justice in concrete cases which are not wholly or adequately covered by existing statutes and the established common law and equity in England. The Natural Law Schools and the Historical School did not distinguish between the finding of the rule and its interpretation for the purposes of its application in judicial practice and would confine both to a simple process of deduction from pre-established codes or principles which are assumed to be perfect and complete. The Analytical School would allow less latitude in the interpretation of a statute than in the finding of the law. With regard to matters clearly covered by the statute they would follow the deductive method insisting upon certainty and uniformity and genuine interpretation with the same rigour as the Natural Law and Historical Schools; but where new cases crop up not exactly coming within the scope and purview of the pre-established statutory and unwritten legal rules and principles (a possibility which they admit in contrast with the others), they allow the judges a fair degree of latitude and freedom in the exercise of their subjective sense of justice.

Allows liberty and discretion to the judge to fill up gaps and deficiencies in the existing Law.

And draws a distinction between the finding of the rule and its interpretation, allowing greater judicial freedom in the former than in the latter.

The interpretation of statutory rules may be sometimes fixed by the law itself in the shape of clauses or separate acts prescribing the meanings of legal terms and phrases or the mode of application of legal rules. Here law comes to include the rules of interpretation and to stand as inter-

Interpretation of statutory rules.

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[1] Technically called principles of justice, equity and good conscience.

**Legal interpretation, authentic or usual, is no interpretation (*i.e.*, by the judge) at all.**

preted according to the rules. Sometimes there are modes of interpretation fixed by unwritten practice having itself the force of customary law. In both cases interpretation ceases really to be interpretation, but, as a part of the law itself, comes within the first branch of the judicial process, *viz.*, the finding of the Law. What Holland describes as 'legal interpretation,' either 'authentic' or 'usual' is, properly speaking, not by the judge, but by the Law itself of its own rules.

**Judicial interpretation must be doctrinal: either grammatical or logical.**

Judicial interpretation therefore is really what Holland describes as 'doctrinal'—resting upon its intrinsic reasonableness.[1] This may be either (1) grammatical, *i.e.*, literal or (2) logical, turning respectively on the ordinary grammatical meaning of the language (words and sentences) of the law or on the supposed will or intention or object of the legislator. These two kinds of interpretation, as distinguished from the third, which, as advocated by the Positivistic or Sociological jurists I shall presently describe, have been favoured by the earlier theories of jurisprudence. Those more subjectively inclined would be ready to strain the language of the statute to give effect to the evident will of the legislator which, *ex hypothesi*, is the real source of the law; whereas the objective theories would stick to the letter of the law and give to it no other than its grammatical meaning lest judicial interpretations put upon it at random on mere guesses (as to the will of the legislator), and differently by different

**The latter supported by the subjective and the former by the objective standard of interpretation.**

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[1] Jurisprudence, Ch. XVIII.

judges, should lead to want of uniformity and certainty in the law. The legislative will (according to this view) is only to be determined from the words used by the legislator himself; and it cannot be substituted by the will of the judge putting his own interpretation on words that do not ordinarily and grammatically bear that construction. We have in the decided cases in England and India cautious blending of both these (subjective and objective) views. There is ardent desire to ascertain the will of the legislator behind the statute but constant safeguards are insisted on so that the judges may not go astray to substitute their own wills for that of the law-maker in the name of interpreting and giving effect to the latter.

The Sociological theory of interpretation[1] is based on the principle that the language as well as the will of the legislator are themselves the expression and product of the social forces which create the law *at the time of the legislation;* and the value, *i.e.*, the accuracy and validity, of the statute would therefore be proportionate to the capacity and the opportunity (including the available means of information) of the legislator to estimate, focus and reflect these forces adequately. The judicial application of the law is correct only if the true law of the society *at the time of the decision* is administered in dispensing justice. Hence it follows that the judicial interpretation of statutes should be

The Sociological theory of interpretation.

[1] This corresponds to the Sociological theory of 'free decision' (as modified by Geny and others) regarding the finding of Law discussed above. In fact this is hardly a theory of interpretation, but rather of 'application' of the Law discussed below.

sociological, *i.e.*, in view of, or with reference to, the social forces themselves (behind the statute or the legislator) operating *at the time of the decision*; so that the error or inadequacy of the statute to express them (however it might have come in, *e.g.*, either through the legislation itself being an inaccurate re-

**The interpretation should be not of the words of the statute nor of the will of the legislature but of the social forces that bespeak the true law at the time of the decision.**

presentation of the social forces that had been in operation at the time, or due to the social forces having since evolved into different shapes and forms under new conditions and necessities some of which the legislation itself might have created) may be corrected and made up. Kohler objects to the older methods of judicial interpretation of enacted law which are either grammatical or logical, *i.e.*, aiming either at the literal construction of the language of the statute or the finding of the supposed will of the legislator; and he exposes the inadequacy of these methods by an examination of the sociological character of legislation itself. The legislator's own will, ideas or intention, he points out, have only a small and comparatively minor part in the legislation; the thought of the legislator as well as the words of the statute are independent of his will. The legislator is the product of his age, saturated with the notions, ideas and civilisation of the atmosphere surrounding him, and his thoughts are accordingly independent of his will. His words also carry meaning fixed by a long historical and sociological process of language-formation and not dependent upon his choice. Statutes should accordingly be interpreted as if they were the products of the entire people containing within themselves the results of an infinite amount of social

**Kohler's objections to the older methods of interpretation.**

labour and hence wiser than the legislator. They are the thoughts of mankind itself and by no means those of the individual author. Unlike the words of the legislator used in private talk the words used in the statute are words expressive of a public thought; and if the words are capable of bearing several meanings or thoughts, judicial interpretation of the statute for the ascertainment of the right meaning or thought becomes an important part of judicial duty going much deeper than the finding of the grammatical meanings of the words or the will or thought of the legislator; and this is more clear when the legislature is composed of several individuals where there is every likelihood of the different members having different meanings or thoughts in their minds while agreeing to the same collocation of words. According to Kohler there are three principles that in order of their relative importance should furnish judicial interpretation of statutes:— (1) the principal consideration in interpreting statutes should be the selection of the meaning which is the most reasonable and will produce the most beneficial effect; (2) when several meanings may be possible which are equally reasonable and salutary, preference should be given to that which will be most consistent with the other provisions in the statute and with the rest of the law so that the whole law of the country may have an organic unity; and (3) where even this does not suffice to obtain a clear result, it may be proper to refer to the history of social movements, *i.e.*, to enquire into the social needs, objects and purposes, which were agitating the society at the time of the

Kohler's view regarding the proper principles of interpretation.

legislation and which the statute had in view, for the determination of the correct interpretation. Interpretations will however change from time to time as the social needs, conditions and forces develop new phases and forms; for statutes (as all other legal rules) being really means for the betterment of society, by the fulfilment of its needs, curing of its diseases and defects and the improvement and development of its capacities (and not merely, like the laws of external nature, statements of unchangeable sequences, truths or facts relating to the society), would lose all their value and usefulness if the same meaning as suited them excellently to the social needs and conditions at their inception is continued after these had changed; and in order that interpretations may change to suit the statutes to their changing conditions, it is desirable that the statutes should themselves be given a certain elasticity.[1]

Interpretations must change to suit changing conditions.

Preliminary utterances, declarations and debates not relevant to interpretation.

As regards the preliminary utterances, declarations in reports or the debates prior to the passage of an Act, Kohler regards them as not of much importance (and indeed as often misleading on account of their involving accidental and personal elements) for discovering the true meaning of the statute. His views here tally with those of the English Analytical School and with the established principles of interpretation in British Courts; but in the matter of free interpretation, as also in the matter of elastic and artistic drafting of statutes giving them a grace

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[1] See Kohler, Philosophy of Law, Vol. XII, Leg. Philosophy Series.

and style and providing fine scope for free and changing interpretations, his views are decidedly against the British methods of narrow interpretation and "wooden" "school-masterly" statutes which, he says, for their strange and repellent phraseology, would fail to enter into the conscious memory of the people and become part and parcel of the popular mind and would retard the legal education of the people.

Kohler's criticism of 'narrow interpretation' and 'wooden statutes' of the British courts and legislature

The application of the law, which represents the third step in the judicial process (after the finding of the rule and its interpretation) has no juristic importance in the theory of the Natural Law or of the Historical jurists. The whole process is formal, deductive or mechanical. The judge has no independent voice or discretion throughout the procedure; he has only to know the whole law (which is assumed to be perfectly pre-established) and to find out of it the appropriate rule (that must be there) for every case that turns up for decision, give it its accurate interpretation and *apply it irrespective of consequences*. The Analytical school, by its admission that the law is imperfect and capable of judicial development, attaches greater importance to the application of the law, which thus becomes not merely deduction and logic but a matter of discretion as well, involving law-making at least in case of gaps. The application of law to concrete cases, which was hitherto subordinated to the finding and interpretation of the law in juristic theory has, however, come to be regarded as the most important of the three judicial functions by the Social-Philosophical

The application of the Law.

View of the Law of Nature and Historical Schools reduces every step to a deductive process.

According to the Analytical School application of the law involves law-making in the case of gaps.

The recent view (*i.e.*, of the Social-Philosophical and Sociological jurists) that law is not an end in itself but only

a means to concrete justice revolutionises the older ideas and raises the application of Law to a position of greater importance than the finding of the law and its interpretation.

(*e.g.*, the Social-Utilitarians,[1] Neo-Kantians and Neo-Hegelians) and Sociological jurists; for according to them law is not an end in itself but only a means to concrete justice which is the end. Now as soon as this view is adopted as the correct legal principle in the administration of justice the juristic method governing the finding of the law and its interpretation would be wholly revolutionised, and it would favour flexibility in law and judicial freedom in the manipulation of Law to an extent far in excess of the orthodox principles and method of the Natural Law or the Historical and (even of) the Analytical Schools.

The three methods recognised in our days :—

1. Deductive method (Rationalists and the German Historical School).
2. Free decision in the light of some definite theory (Sociological and Social-Philosophical Schools).
3. Pragmatic method adopted in England and America.

Thus we now have in the juristic theories three methods for the judicial finding of the law for its application in concrete cases :—(I) Deduction favoured by the theory of Natural Law and the German Historical School and adopted in general practice in Germany, (II) The opposite extreme method of developing the premises of the law in accordance with some definite theory (*e.g.*, of 'justice,' or 'culture' as formulated respectively by Stammler and Kohler) as to the end of law or as to the relation of individual and social interests (as conceived by the Sociological schools) and (III) The cautious and more practical method of developing the legal premises only in cases where such development is urgently needed—*e.g.*, *in case of gaps*—and even in such cases proceeding by the light of experience or anticipation of the actual results of the introduction and application of the rule. This last method

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[1] *Cf.* Jhering and see Lecture VII.

(somewhat similar to the corresponding method of legislation) is called the Pragmatic method[1] and although it is decried as unscientific[2] on account of the absence of any legal theory to guide the advance like the Social-Philosophical and Sociological method (II) referred to above, is sociologically useful; it is in vogue in England and sometimes in America. The position in America has become very anomalous and acute on account of the clashing of the old and new ideas on the subject in judicial and professional circles. Juristic opinion has till lately been very conservative and chary in the matter of freedom of judicial legislation due to the legal instincts (especially of the older members) having been largely moulded on principles borrowed from the 'Law of Nature' and the (German) Historical Schools both of which, as we have seen, inculcated the doctrine of a perfect body of pre-existing legal principles and left no room for judicial departures from, or improvements upon, them. Their "Blackstone" which was in those early days something like the juridical 'Bible' of the young law student stimulated the same attitude. With these instincts they would often offer strong opposition even to legislative interventions for effecting change in the time-honoured principles of Natural Law (identified by them with the English Common Law) (*e.g.*, as to the sacredness of individual freedom or property, etc.) to suit them to the modern social needs; and the strict constitutions of the states putting rigid and

The anomalous position of things in America.

The orthodox School opposed judicial as well as legislative interference with the principles of English Common Law.

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[1] See Lecture IX.

[2] See criticism of this method by Kocourek quoted above.

Besides, the strict constitution of the American States hampered legislation. *Per contra* in England, where the legislature was omnipotent.

explicit limitations on legislative powers would often render their opposition formidable and seriously hamper the amelioration of law by regular legislation. There was no such difficulty in England and judicial conservatism did not prove as great an obstacle to the growth and development of law as in America due to the unquestioned omnipotence of the British Parliament in the matter of introducing changes by legislation whenever such changes were necessary. Nor are the judges of England now-a-days so much carried away by the old English view (supported by the Natural Law and Historical theories of law) as to the limitations of judicial power against which the indigenous (Analytical) theory as developed by Austin offered an effective opposition and check.[1] The result was that while in England the legislature as well as the judges were, in theory as well as in practice, more alive to, and ready for, filling up the gaps and even making changes in the law when necessary,[2] and, however

Austin's support of judicial legislature checked the older ideas favoured by Blackstone.

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[1] See Austin's refutation of Blackstone's idea that judges do not and cannot make new laws. Holland's Jurisprudence, Ch. V.

[2] Holland in his excellent text book (Ch. XVIII) regards "the application of Law" as constituting the whole judicial process which includes besides the determination of the appropriate 'forum,' the finding of the 'lex' and its 'interpretation.' He however there deals with the question of the finding of the law mainly from the point of view of private international law; but elsewhere (Ch. V) he concedes (and his view may be taken as representative of the modern English Analytical School) that the courts in all countries have a necessary power to a certain extent of making rules for cases not provided for previously; and even of modifying existing laws from time to time in order to carry out the current ideas of what is equitable or to adapt them to the changing needs of society. The judicial addition or amendment of the law, he points out, is clearly observable in

cautious and hesitating their actual steps in that direction might be, bringing it abreast of the social evolution, the popular clamour for concrete justice and legislative and judicial intervention for the creation of better laws (for the purposes of justice according to the acute social necessities of the present day) was throughout insufficiently attended to and even thwarted by the Legislature and still more by the Bench and the Bar in America. So long as the glamour of the theory of Natural Law and Natural rights of the individual (borrowed from England[1] but more directly from France[2]) continued unabated in the young American States that owed to it their freedom together with their reverence for the Common Law, it was difficult to have any other principle or theory of judicial method recognised in juristic circles except that countenanced by the Law of Nature or the Historical Schools. The very fact that schools so openly antagonistic in other crucial points as these two were at one regarding the proper scope and method of administration of justice must have also weighed very strongly to incline the American legal opinion in their favour. It is only recently that the evils of conservatism in law have come to be felt by lawyers in America as too great to be ignored and a band of younger sociologists and jurists has taken up the cause of free judicial decision in support of

The crisis in America due to the clash of popular clamour and juristic opinion.

The recent change of legal opinion.

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mercantile cases. Judicial decisions do not rest on Logic alone. (See also Vinogradoff, Historical Jurisprudence—Introduction—"Law and Logic.")

[1] *i.e.*, the Common Law principles of freedom.

[2] For the juristic ideas that prevailed in the era preceding the French Revolution, see preceding Lecture II.

Fuchs, Geny and others. Numerous decided cases are being held up for ridicule and criticism and the grave injustice of these cases caused through the uncritical and dogmatic conservatism of the judges is being pointed out to impress upon the society the mistake of the orthodox judicial theory and practice; and as a result of their efforts the tide seems to have turned and pragmatic efforts are recently coming to be made for the reconciliation of theoretic and concrete justice by the Legislature as well as by the Bench.

**Theories of legal punishment.**

Coming, last of all, to the theories of legal punishment, we know how in the older days it was fixed on the popular principle or spirit of private revenge or retaliation. This principle or spirit had

**Principle of private revenge.**

to be humoured (while its rigour and uncertainty had to be subdued) so that the punishment fixed by the law might be acceptable to the community and to the aggrieved individual as a better and more satisfactory substitute for their crude natural remedies. Sir Henry Sumner Maine[1] familiarised us here in India with the ancient history of the process by which legal remedies began to take up the place of private revenge first by accepting its standard (at least in part) while reducing its bitterness, uncertainty, unreasoning passions and partiality. We have learnt from him how the function of the court was (originally in fact and latterly as a legal fiction) that of an arbitrator voluntarily chosen by the disputing parties and the 'sacramentum' which

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[1] Ancient Law, Ch. X (also Pollock's note VIII). Early History of Institutions, Chap. IX, see also Ortolan's History of Roman Law.

Principle of Arbitration.

was the stake forfeited to the state by the losing party was regarded as the reward or remuneration for the services of the state as arbitrator. In explaining how the amount fixed as the stake came to be reduced[1] in course of time, as also how the function of the arbitrator came to be assigned to persons appointed by the state instead of men chosen by the parties, Maine offers the generally accepted theory that, as the law developed with the social organisation and the strengthening of the central authority of the state, the usages (*e.g.*, of leaving wrongs to the arbitration of the community or the state and of abiding by the remedies proposed and enforced by the arbitrator) which were first voluntarily submitted to by the individuals for their palpable usefulness and advantage came afterwards to be compulsory and consolidated into law.[2] Similar theoretical reasons[3] will account for the expansion of the law of crimes and the gradual and progressive inclusion of what had in earlier days been regarded only as private wrongs (to be remedied in civil litigations by damages awarded to the wronged individuals) into the list of crimes against the 'peace' of the king

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[1] *Cf.* the two talents of gold, depicted as the stake in the Homeric trial scene (see Iliad, E. 497-508), and described by Homer as moulded by the mythological god Hephaestes into Achilles' shield, with the trifling amount demanded later on as sacramentum in the Roman Actio Sacramenti.

[2] And the 'stakes' and 'fees' instead of being real, became 'formal.'

[3] *i.e.*, greater consolidation of the state and extension of the scope and number of "public interests." What was originally regarded as a tort comes down to be considered as a crime, *i.e.*, an infringement of the "King's peace" or an offence against the state.

or the state calling for punishment. With this development of the law of crimes there was also development in the theory of punishment also. The theory of retaliation or retribution of the wronged party (now the state) held by the classical schools and penal statutes or codes was not indeed given up. It however took two distinguishable forms. (*a*) One was that of the natural reaction of a violated law irrespective of any consideration of reparation or compensation for injury. Punishment was in this view the natural, certain and almost mechanical response or retribution of law to the violation of its sacredness or majesty. It was the positive and equal evil rebounding from the law due to the impact of the evil that the criminal hurled against the law by his act,—the prototype of the principle of mechanical impact or of the ancient principle of equal private retaliation (eye for eye or tooth for tooth). (*b*) The other was that of cure or compensation, or restoration of harmony of the state, by setting right the injury or disturbance of equilibrium caused by the crime. After this, there developed (*c*) the further juristic theory of prevention. Not only must the theory of punishment look to the upholding of the majesty of the law by the natural retribution, retaliation or reaction against violent impacts against it, or to the reparation of the injuries caused thereby to the society, but also to their prevention by precautionary measures, *viz.*, by fixing punishments which should operate as salutary deterrents to the criminals in future. The older juristic theories were thus limited to these three principles of prevention, cure or retaliation. The Sociological schools headed by Jhering

The theory of retaliation, its two forms :—

(*a*) natural reaction,

(*b*) cure or compensation.

The theory of prevention.

have however evolved a newer theory that punishments should be adjusted not to the crime but to the criminal,—*i.e.*, should be looked at not as ends but as means to social ends—with reference to the future rather than to the past. This theory vetoes the principle of cure and retaliation or retribution but is akin to the theory of prevention. It is however an advance upon the theory of prevention in its broader social outlook and scientific foresight. The modern science of Criminology has taken up this line of thought and has been recently developing in rapid strides.[1] Criminal *Psychology* also, especially with reference to the operation of the psychological laws of conscious imitation and subconscious assimilation in the development of criminal mentality and tendencies, has been developed immensely by Gabriel Tarde (b.1843)[2] and others. These modern Sociological—biological and psychological—presentations rake up afresh the old doubts and disputes regarding man's (here the criminal's) freedom of will and his consequent responsibility for crimes ; and the modern scientific view has in fact revolutionised the theory of punishment. Are crimes and criminals social products of environmental (historical and racial) *i.e.*, of physical, physiological and ethnological

The Sociological theory. Punishment is to be adjusted not to the crime but to the criminal,

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[1] Under the capable leadership of comparative *ethnological* and *anthropological* investigators like Ferri (b. 1856), Liszt (b. 1851), Hamel, Finger (b. 1858), Lilienthal (b. 1853), Aschaffenburg, Garofalo, Sighele, Karl Stoos (b. 1849), Lammash (b. 1853), and others.

[2] Together with many amongst those above named, he has had other followers and co-workers in the field like Kreuse, Wahlberg, Havelock Ellis, Hansgross, besides the great Italian Lombroso.

forces? If so, should not the criminal be looked upon as an object of pity, and should not the punishment of law (for crimes) therefore assume the character of medical treatment of the criminal than that of punishment? Should we not therefore so reform the law that its aim may be directed more to the general prevention or correction of social conditions that afford a favourable atmosphere for the birth and growth of criminal minds, habits and tendencies —than to the punishment of criminals? How far does punishment itself, as recommended or meted out under the existing juristic theories and legal systems, contribute towards or retard the amelioration of these social conditions? These have become in our days very interesting and prominent topics bearing upon the theory of legal punishment.

and should aim at the improvement of his environmental (social) conditions.

Topics discussed in our days bearing on the problem of punishment.

Judicial discretion in the matter of punishment.

That a large amount of freedom or discretion must be allowed to the judges in the matter of fixing the proper punishment for the criminals before them has now become a generally accepted creed of modern Jurisprudence. As early as 1861 Sir Henry Sumner Maine observed this tendency of the modern positive laws of civilised societies with regard to legal punishment and remarked that it was the natural result of the recognition of the higher principle that legal punishment should be fixed not on the basis of the clear feelings of the injured man at the time when the culprit is apprehended but on the degree or extent of the moral culpability or guilt of the criminal which is more variable and more difficult to ascertain. It is for the judge to find out the degree of the moral guilt from the circumstances of the case and fix the proper sentence. In the 20th century

this freedom or discretion of the judge is likely to be allowed in even a greater degree than in 1861; for the moral guilt of the accused will (it is expected) be traced to its antecedent conditions in a true scientific spirit, the "criminal will" itself being studied and accounted for as an abnormal growth or product of the natural and social forces and conditions.

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# APPENDIX I.

See Part I, Lectures I to IV.

**The Individualistic Theories (Mechanical conception of Society and Law prevailing)**

- **Empirical (or Scientific or Realistic)**
  - **Analytical**
    - Dogmatic 'Law of nature' and 'Social Contract' Theories of the Empirical type, *e.g.*, Hobbes, Locke, Hume, etc.
    - Formal (of the Empirical type)
      - English, *e.g.*, Austin, Holland
      - American, *e.g.*, Gray, Salmond
  - **Historical**
    - English, *e.g.*, Maine
    - German, *e.g.*, Hugo, Savigny
- **Philosophical (or Idealistic)**
  - **Dogmatic**
    - Law of Nature School of the 17th century, *e.g.*, Grotius, Puffendroff
    - Law of Nature School of the 18th century marked by Separation of Law and Morals (*e.g.*, Thomasius)
  - **Formal, *e.g.*, Kant, Fichte**

# APPENDIX II.

## See Parts II and III, Lectures V to VII.

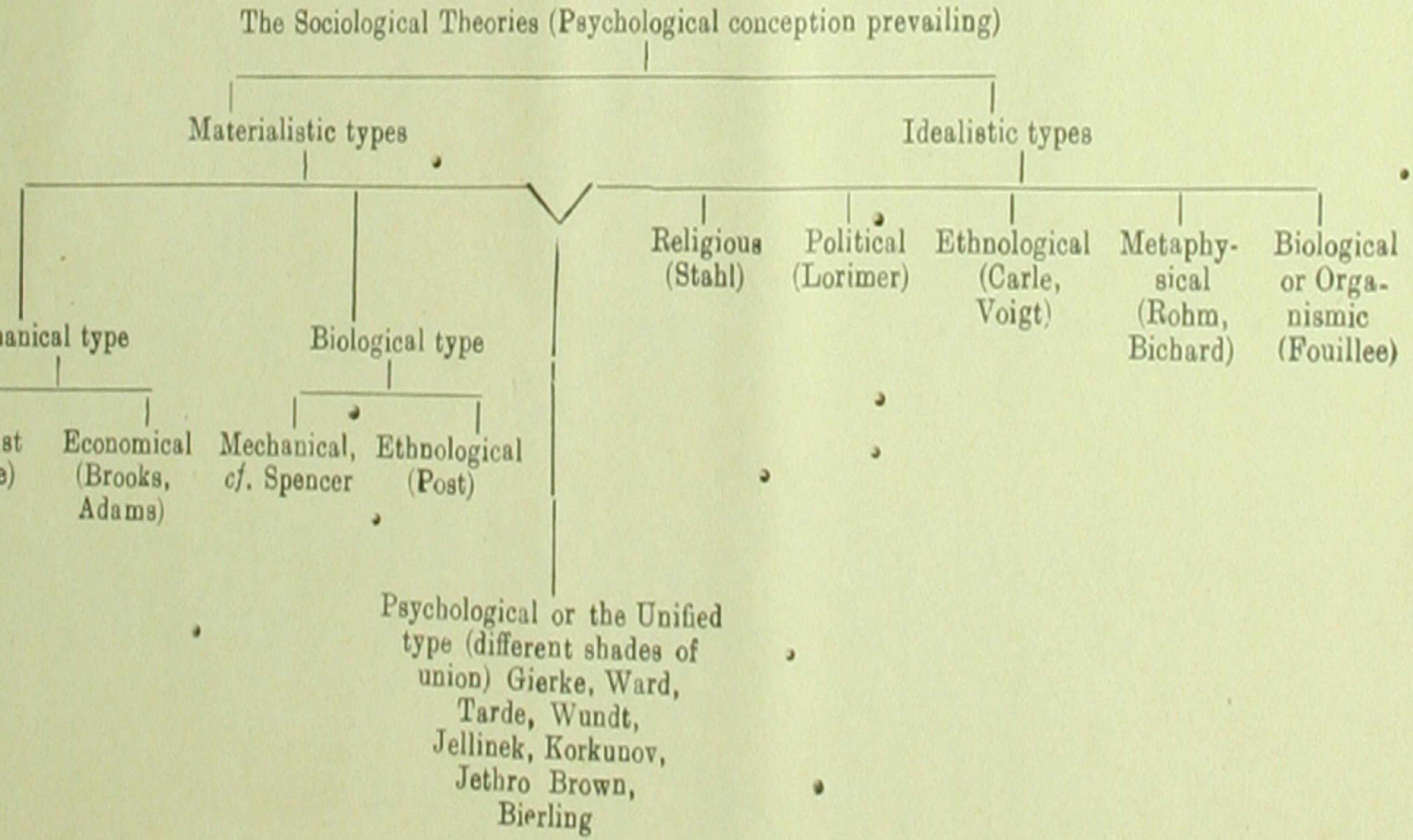
The Theories as they evolved under the Sociological tendency (Organic conception prevailing)

- Philosophical (Idealistic)
  - Metaphysical (Evolutionary Idealism) *e.g.*, the Hegelians and Herbartians
  - Organic, *e.g.*, Schelling, Krause, Abrens, Roder
  - Social Philosophical (Evolutionary Pantheism or Realistic Idealism)
    - Neo-Kantianism (Analytical & Philosophical) (*e.g.*, Cohen, Natrop, Stammler) Del Vecchio, Saleiles (Social Utilitarianism of the Idealistic type)
    - Neo-Hegelianism culture interpretation (Historical & Philosophical) (*e.g.*, Kohler)
- Empirical or Realistic
  - Analytical
    - Positivist (*e.g.*, Comte)
    - Neo-Austinian (*e.g.*, Jethro Brown)
    - Comparative (Analytical & Historical) (*e.g.*, Jhering) (Social Utilitarianism of the Realistic type)
  - Historical (Evolutionary Realism)
    - Biological or Organic (Spencer)
    - Ethnological (Post)

# APPENDIX III.

## See Part III, Lectures VI to X.

### *Sociological Jurisprudence and its Subdivisions.*



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